No. 89-5809

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT SAWYER,

Petitioner,

v.

LARRY SMITH, Interim Warden,
Louisiana State Penitentiary,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

CATHERINE HANCOCK*
ELIZABETH W. COLE
7031 Freret Street
New Orleans, LA 70118
(504) 865-5949
Counsel for Petitioner

**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTIONS PRESENTED

I. Whether the decision in *Caldwell* v. *Mississippi*, condemning false and misleading prosecutorial arguments to a capital jury concerning the jurors' sentencing responsibility, should be applied retroactively:

(A) because *Caldwell* did not create a "new rule" under the standards of *Teague* v. *Lane* and *Penry* v. *Lynaugh*, or

(B) because *Caldwell* vindicates rights of fundamental fairness that enjoy a special exemption from the non-retroactivity rule of *Teague* v. *Lane*?

II. Whether petitioner Sawyer is entitled to a new sentencing hearing on the ground that his Eighth Amendment rights were violated when the prosecutor made false and misleading arguments to his capital jury concerning the jurors' sentencing responsibility?

TABLE OF CONTENTS

Table of Contents Continued

Table of Contents Continued

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

BRIEF FOR PETITIONER

CITATION TO OPINIONS BELOW

The En Banc opinion of the Court of Appeals for the Fifth Circuit is reported at 881 F.2d 1273 (5th Cir. 1989), and is reproduced in the Joint Appendix (J.A.) at 214-289. The opinion of the panel that was vacated in part by the En Banc Court is reported at 848 F.2d 582 (5th Cir. 1988), and is reproduced at J.A. 154-211.

The memorandum opinion of the United States District Court for the Eastern District of Louisiana (Mentz, J.) has not been reported. The District Court adopted, with modifications, the Magistrate's Findings and Recommendations, which are not reported. Both the District Court opinion and the Magistrate's opinion are reproduced at J.A. 94-153.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment, which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment, which provides in relevant part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves the following Louisiana statutes, which are reprinted in Appendix A:

Louisiana Code of Criminal Procedure, Article 905.6

Louisiana Code of Criminal Procedure, Article 905.7

Louisiana Code of Criminal Procedure, Article 905.8

Louisiana Code of Criminal Procedure, Article 905.9

Louisiana Supreme Court Rule 28

STATEMENT OF THE CASE

Robert Sawyer was represented at his first degree murder trial by an attorney who was unqualified under Louisiana statutory law to defend death penalty cases, and who received $1,000 for his work. Before trial, Robert Sawyer was offered a plea bargain that would have allowed him to plead guilty to murder and to receive a mandatory life sentence, but he declined the plea. His co-defendant, Charles Lane, was prosecuted for first degree murder in a separate trial, and received a life sentence from his sentencing jury. The prosecutor in Charles Lane's case then prosecuted Robert Sawyer, and sought the death penalty. J.A.12, 155-158.[1]

At the guilt phase of Robert Sawyer's trial, the prosecutor made a closing argument and defense counsel then stood silent, waiving his closing. After the jury returned a guilty verdict on the capital charge, a sentencing hearing was convened, and the presentation of witnesses lasted a little over an hour. The prosecutor then gave his closing argument, going first. The complete text of the closing arguments at the sentencing hearing appears at J.A. 6-13. The prosecutor's arguments included the following statements:

> [Following a discussion about the statutory death penalty factors that the prosecutor was presenting to the jury for its consideration:]
>
> That will be a question of fact for the jury to decide. *The law provides that if you find one of these aggravating circumstances then what you are doing as a jury, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you* the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct *are of the opinion* that there are aggravating circumstances as defined by the statute, by the State legislature *that this is the type of crime that deserves that penalty. It is merely a recommendation* . . . . [J.A. 7 (emphasis added).]
>
> [Following an argument about how the defendant is to blame for his own situation:]
>
> There is really not a whole lot that can be said at this point in time that hasn't already been said and done. The decision is in your hands. *You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree* and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and the impact of the law of Louisiana. *All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less.* [J.A. 8-9 (emphasis added).]
>
> [Following a discussion about how the evidence relates to the statutory factors required for the death penalty:]
>
> . . . I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. It's all your doing. *Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are*

---

[1] Robert Sawyer lived with his girlfriend, Cynthia Shano, and her two children. Her friend, Frances Arwood, stayed with the children one night while Robert, Cynthia and Charles Lane went out drinking together. Robert and Charles Lane returned to the house at 7:00 a.m. and were both sleep-deprived and drunk from an excessive amount of alcohol. They went out of control when Robert discovered evidence that Ms. Arwood had given drugs to the children. Robert's girlfriend testified against both Charles Lane and Robert concerning the beatings and other injuries Ms. Arwood received from the men. Ms. Arwood later died. *State* v. *Sawyer*, 422 So.2d 95, 97-98 (La. 1982). Robert Sawyer's sister testified that Robert himself was an abused child, who received extremely harsh and brutal treatment from his father after his mother committed suicide. He was kept isolated from others, was subjected to harsh labor on his father's farm, and often was whipped and beaten. He was committed to a state mental institution after running away from home. *Id.* at 100.

pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions . . . . [J.A. 9 (emphasis added).]

Following the prosecutor's closing argument, defense counsel responded with a one-page closing. The prosecutor then returned to make a second closing argument, and stated in conclusion:

> [Following an argument about how Robert Sawyer should receive the death penalty even though his co-defendant, who was tried separately, received a life sentence:]
>
> There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is the time and *I ask you that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that* as a jury based on all the facts and circumstances within your knowledge *you recommend the death penalty.* [J.A. 13 (emphasis added).]

The jury then received its instructions, and after deliberations returned a sentence of death on September 19, 1980. This death sentence was binding on the trial court under Louisiana law. *See* La. Code Crim. P., Art. 905.8 (1976).

Following appellate proceedings in which Robert Sawyer was represented by different counsel, present counsel filed a petition for certiorari and the conviction was vacated. *See State* v. *Sawyer*, 422 So.2d 95 (La. 1982), *vacated and remanded*, 463 U.S. 1223 (1983). Robert Sawyer's conviction became final on April 2, 1984. *Sawyer* v. *Louisiana*, 442 So.2d 1136 (La. 1983), *cert. denied*, 466 U.S. 931 (1984).

On May 8, 1984, Robert Sawyer filed a state post-conviction petition, raising twenty claims. Among them was a claim that was soon to be known as a "*Caldwell*" claim, namely that Robert Sawyer's Eighth and Fourteenth Amendment rights had been violated because the prosecutor's sentencing phase argument injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence. *See Caldwell* v. *Mississippi*, 472 U.S. 320 (1985) (decided on June 11, 1985). The state trial court denied the petition on the same day it was filed, without opinion. On appeal, the Louisiana Supreme Court remanded the case to the trial court for an evidentiary hearing. The case was submitted on the record and the trial court denied the petition in an unpublished opinion. J.A. 72-86. On appeal the Louisiana Supreme Court remanded the case to the trial court again for an evidentiary hearing. The trial court denied the petition again at the close of the hearing, without opinion, giving oral reasons. J.A. 88-92. A closely divided Louisiana Supreme Court affirmed the trial court's ruling, by a vote of 4-3, without opinion. *See Sawyer* v. *Maggio*, 479 So.2d 360, *reconsideration denied*, 480 So.2d 313 (La. 1985).

Having exhausted his state remedies, Robert Sawyer filed a federal habeas corpus petition on January 20, 1986. The petition was assigned to a magistrate, who rejected all claims in an unpublished opinion of "Findings and Recommendations." J.A. 94-146. On the *Caldwell* claim, the magistrate found that the prosecutor's arguments "dangerously approach[ed] reversible error," but he also found that the "standard to be employed in determining whether prejudice resulted" from the arguments "is the 'reasonable probability' test for determining prejudice established by *Strickland* v. *Washington* [466 U.S. 668 (1984)]," and that this standard was not satisfied. J.A. 129, 132. The District Judge affirmed the magistrate's findings and recommendations in an unpublished order. J.A. 147-153.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision denying relief. *Sawyer* v. *Butler*, 848 F.2d 582 (5th Cir. 1988).[2] The Court of Appeals granted rehearing En Banc on August 25,

---

[2] The panel rejected Robert Sawyer's claims of ineffective assistance of counsel and denial of due process and equal protection from his representation by a trial attorney unqualified to represent capital defendants under state law. The panel divided over the resolution of the *Caldwell* claim. *See Sawyer*, 848 F.2d at 599-606 (King, J. dissenting).

1988. After oral arguments, the En Banc Court requested supplemental briefs concerning three questions arising from this Court's decision in *Teague* v. *Lane*, 489 U.S. ____, 109 S. Ct. 1060 (1989). J.A. 212-213. One of these questions, "Does *Teague* apply to collateral attacks upon a sentencing proceeding in a capital case?", was answered in the affirmative by this Court, one month after supplemental briefs were submitted to the En Banc Court. *See Penry* v. *Lynaugh*, 489 U.S. ____, ____, 109 S. Ct. 2934, 2944 (1989). The other two issues remain questions of first impression in this Court: "Does *Caldwell* articulate a rule that is new within the meaning of the *Teague* test?" and "Does *Caldwell* announce a rule that falls within the fundamental fairness exception to the *Teague* rule?"

The En Banc Court issued opinions on August 15, 1989, dividing sharply over these two issues. Judge Higginbotham wrote for a majority of nine judges who found that *Caldwell* is "new law" and does not fall within *Teague's* fundamental fairness exception. *Sawyer* v. *Butler*, 881 F.2d 1273 (5th Cir. 1989) (*en banc*). Judge King authored a dissent for five judges who would have found that *Caldwell* should be applied retroactively to Robert Sawyer's case, both because *Caldwell* was not "new law" and because *Caldwell* violations fall within *Teague's* fundamental fairness exception. *Sawyer*, 881 F.2d at 1295. Judge King noted that if Robert Sawyer's case had been decided "on the basis of the Supreme Court decisions in existence when Sawyer's case was argued and submitted . . . the majority opinion would have granted him a new sentencing hearing." *Id.* at 1305. Judge Rubin expressed his concurrence with the views of the dissent, but did not vote. *Id.* at 1275 n.1.

This Court granted certiorari on January 16, 1990. J.A. 290.

SUMMARY OF ARGUMENT

The Court of Appeals majority erred because it held *Caldwell* v. *Mississippi* to be non-retroactive "new law," rejecting the view that *Caldwell* was dictated by this Court's precedents under the standards of *Teague* v. *Lane* and *Penry* v. *Lynaugh*. If the Court had correctly traced *Caldwell's* antecedents in Eighth Amendment case law, it would have concluded that

Caldwell was indeed dictated by the principles in such precedents as *Woodson* v. *North Carolina*, *Gardner* v. *Florida*, *Lockett* v. *Ohio*, *Eddings* v. *Oklahoma*, *Zant* v. *Stephens*, and *California* v. *Ramos*. As *Caldwell* is "old law" under these precedents, the majority should have applied its rule to petitioner's case.

The majority's error was based on its misapprehension of *Penry*, which directs courts to consider Eighth Amendment precedents when the retroactive application of sentencing phase rights is at issue. Its error was also based on its misapprehension of *Teague* v. *Lane*, which directs federal courts to consider the state court perspective in making retroactivity rulings. By ignoring that perspective, the majority failed to find what any state court would have found at the time Robert Sawyer's conviction was final: *Caldwell* was a predictable evolution in Eighth Amendment law. The majority's search for *Caldwell's* origin in the Due Process case of *Donnelly* v. *DeChristoforo* was misguided, because no state court would have regarded *Donnelly* as the starting point for analyzing *Caldwell* error in the era following *Gregg* v. *Georgia*.

The Court of Appeals majority also erred because it rejected the proposition that *Caldwell* should be applied retroactively under *Teague's* "fundamental fairness" exception. If the majority had considered the policies behind this exception, and the implicit guidelines in *Teague* for identifying rights that fall within the exception, it would have found that the *Caldwell* rule qualifies as one insuring "fundamental fairness" under *Teague*. Instead, the majority misapprehended *Teague*, and relied on definitions of "fundamental fairness" from inapposite sources of doctrine that should not be transplanted into non-retroactivity law.

This Court should apply *Caldwell* retroactively to the Petitioner's case, either on the ground that it is "old law," or on the ground that it deserves this application under *Teague's* exception. Once *Caldwell* is so applied, it becomes evident that Petitioner should win on the merits. The prosecutor in Petitioner's trial made false and misleading arguments that the jury's death verdict was non-final and reviewable for cor-

rectness by appellate courts. The *Caldwell* violation was focused, unambiguous, and strong, and it was not corrected by the trial judge or the prosecutor. Therefore, this Court should reverse the judgment of the Court of Appeals, and grant Petitioner a resentencing hearing under *Caldwell* in order to vindicate his Eighth Amendment rights.

ARGUMENT

I. *CALDWELL* V. *MISSISSIPPI* SHOULD BE APPLIED RETROACTIVELY TO GIVE ROBERT SAWYER A NEW SENTENCING HEARING AS A REMEDY FOR HIS PROSECUTOR'S FALSE AND MISLEADING STATEMENTS ABOUT THE NON-FINALITY OF THE JURY'S DEATH VERDICT. UNDER *TEAGUE* V. *LANE*, *CALDWELL* DESERVES RETROACTIVE APPLICATION BOTH BECAUSE IT WAS DICTATED BY PRIOR EIGHTH AMENDMENT LAW, AND BECAUSE IT RECOGNIZES A BEDROCK PROCEDURAL RIGHT THAT INSURES FUNDAMENTAL FAIRNESS IN ALL DEATH PENALTY TRIALS.

A. This Court's Decision in *Caldwell* v. *Mississippi* Was Dictated By Earlier Eighth Amendment Precedents And Thus Was Not "New Law" Under *Teague* v. *Lane* and *Penry* v. *Lynaugh*.

1. *Teague* and *Penry* Hold That *Caldwell's* Retroactivity Status Is To Be Determined By Considering Whether The Rule In *Caldwell* Was Dictated By Eighth Amendment Precedents As Of The Time Robert Sawyer's Conviction Became Final. The Perspective Of State Courts Is The Touchstone Under *Teague*, And Those Courts Would Have Found *Caldwell* To Be A Predictable Development In Eighth Amendment Law.

To address the threshold issue whether *Caldwell* v. *Mississippi* should be applied retroactively to Robert Sawyer's case, it is necessary to articulate the *Caldwell* rule briefly and to assess its origin in the Eighth Amendment precedents. *See Teague v.* Lane, 489 U.S. ____, ____, 109 S. Ct. 1060, 1078

(1989) (plurality opinion),[3] *citing Bowen* v. *United States*, 422 U.S. 916, 920 (1975); *see Penry* v. *Lynaugh*, 489 U.S. ____, ____, 109 S. Ct. 2934, 2953 (1989) (retroactivity is a threshold question); *see Penry*, 109 S. Ct. at 2944-2947, *and Sawyer* v. *Butler*, 881 F.2d 1273, 1276, 1281 (5th Cir. 1989) (en banc) (brief articulation of rule is appropriate). *Caldwell* requires resentencing when a capital sentencer "has been led to believe that responsibility for determining the appropriateness of the defendant's death lies elsewhere." *Caldwell*, 472 U.S. 320, 329 (1985). Specifically, *Caldwell* holds that the Eighth Amendment prohibits prosecutors from presenting false and misleading information to the sentencing jury concerning its responsibility as the final arbiter of death, because this information creates a risk that a death sentence may be based on a mistaken understanding of the sentencer's "awesome responsibility" for the death verdict. *Id.* at 329 (citing *McGautha* v. *California*, 402 U.S. 183 (1971)); *id.* at 328-334; *id.* at 341-343 (O'Connor, J., concurring).

As this Court has noted, the *Caldwell* rule has several distinctive features. First, the rule is an Eighth Amendment limitation on a particular kind of information: false and misleading information about the power of other authorities, like appellate courts, to modify the jury's death verdict. *See Darden* v. *Wainwright*, 477 U.S. 168, 183-184 n.15 (1986). Second, this limitation is based on the perception that such misinformation creates an unpredictable risk of unreliable death verdicts, and that this risk is prejudicial. *Caldwell*, 472 U.S. at 320, 330-333, 340, 341; *id.* at 343 (O'Connor, J., concurring). Third, this risk is held to be unacceptable when false and misleading information is presented in a clear and direct way, and when that information is not corrected in a clear and direct way. *Id.* at 340, & 340-341 n.7 (false and misleading information that is "focused, unambiguous and strong," and "uncorrected" expressly by the trial judge requires new hearing); *id.* at 343 (O'Connor, J., concurring). Under these conditions, a resentencing hearing must be provided, because it

---

[3] The *Teague* plurality opinion will be referred to as the *Teague* opinion throughout this brief.

cannot be said that this kind of uncorrected misinformation had "no effect" on the sentencing decision. *Caldwell*, 472 U.S. at 341.

Under *Teague* and *Penry*, the pertinent question is what view a state court would have taken of a claim based on this kind of rule at the time Robert Sawyer's conviction became final on April 2, 1984. *See Penry*, 109 S. Ct. at 2944. *Teague* prescribes non-retroactivity for constitutional rules that "break new ground or impose a new obligation on the States or the Federal Government" or that announce a result that "was not *dictated* by precedent." *Penry*, 109 S. Ct. at 2944 (quoting *Teague* with emphasis in original). Conversely, retroactive application of Eighth Amendment rights is appropriate when it would to serve "as a necessary incentive for trial and appellate judges throughout the land to conduct their proceedings in a manner consistent with established constitutional principles." *Teague*, 109 S. Ct. at 1073 (quoting *Desist* v. *United States*, 394 U.S. 244, 262-263 (1969) (Harlan, J., dissenting)). As *Penry* reveals, the retroactivity inquiry should be focused on the expectations generated by previously established constitutional decisions concerning the actions to be taken by state courts, who were charged with the duty of applying Eighth Amendment precedents conscientiously to the evolving problems that came before them. *See Penry*, 109 S. Ct. at 2945-2947.

If state courts would have regarded *Caldwell* as a predictable development in Eighth Amendment law, then the retroactive application of *Caldwell* will not cause them to suffer the frustration of "faithfully apply[ing] existing constitutional law only to have a federal court discover . . . new constitutional commands" later on habeas. *Teague*, 109 S. Ct. at 1075 (quoting *Engle* v. *Isaac*, 456 U.S. 107, 128 n.33 (1982)). Further, if state courts would have expected *Caldwell* to emerge from established constitutional principles, then the retroactive application of *Caldwell* is an appropriate means of assuring that those principles were indeed applied "faithfully." For, when retroactive "holdings can be reasonably anticipated, some incentive may be provided for those who will be affected in the future to seek to conform in advance to the expected standards." Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 72 (1965).

Here, the appropriate expectation of the state courts is demonstrated by their actual behavior. It is clear that state courts before *Caldwell* overwhelmingly endorsed the *Caldwell* rule. *See* cases cited in note 4 *infra*. This Court's opinion in *Caldwell* affirmed the importance of this state consensus as support for its rule. *See Caldwell*, 472 U.S. at 333-334 & nn. 4 & 5. (By contrast, other constitutional principles have been found to be old law rules, deserving of retroactive application, even where the state courts were deeply divided over the predictability of those rules, and where little or no state support for those rules could be discerned. *See Yates* v. *Aiken*, 484 U.S. 211, 217 (1988); *compare Penry*, 109 S. Ct. at 2945-2947 (holding that *Penry's* claim was not new law) *with Selvage* v. *Lynaugh*, 842 F.2d 89, 92-94 (5th Cir. 1988), *cert. granted*, 110 S. Ct. 231 (1989) (Penry's claim had enjoyed no support in the state courts).

There were two sources of support for state court endorsement of *Caldwell* during the early years after *Furman* v. *Georgia*, 408 U.S. 238 (1972). Some state courts enjoyed a tradition of "fair trial" case law that included explicit condemnation of "*Caldwell*" violations in capital and even non-capital cases. *See, e.g., Ward* v. *Commonwealth*, 695 S.W.2d 404 (Ky. 1985). Others, however, created a "*Caldwell*" rule only in the post-*Gregg* era, relying on their obligations to give meaningful appellate review to death verdicts in a way that would eliminate "arbitrary factors" from influencing sentencing juries. *See Gregg* v. *Georgia*, 428 U.S. 153, 198, 204, 207-208 (1976) (emphasizing the need for appellate review of verdicts to eliminate arbitrary factors in sentencing); *State* v. *Sonnier*, 379 So.2d 1336, 1370 (La. 1980), *cert. denied*, 463 U.S. 1229 (1983) (explaining the obligation to review death verdicts for arbitrary factors in order to meet constitutional criteria under *Gregg*-approved procedure for state supreme court review). *See also* La. Code Crim. P., Art. 905.9 (imposing obligation on state supreme court to conduct review that will satisfy "constitutional criteria"). Some courts expressly referred to Eighth Amendment principles in articulating the

need for a *Caldwell* rule in the pre-*Caldwell* era. *See, e.g., State* v. *Willie*, 410 So.2d 1019, 1033 (La. 1982), *cert. denied*, 465 U.S. 1051 (1984) (reversing for "*Caldwell*" error and noting that the discussion of future disposition of death verdicts "encourages the jury to exercise unbridled discretion reminiscent of the latitude found constitutionally objectionable . . . in *Roberts* v. *Louisiana* [428 U.S. 325 (1976)]"). *See also State* v. *Robinson*, 421 So.2d 229, 233-234 (La. 1982) (reversing for "*Caldwell*" error).

Most states that endorsed the *Caldwell* rule before *Caldwell* did so by 1982. *See, e.g., State* v. *Berry*, 391 So.2d 406, 418 (La. 1980), *cert. denied*, 451 U.S. 1010 (1981), and cases cited in note 4 *infra*. However, this Court's Eighth Amendment precedents after 1982 provided still further support for the *Caldwell* rule, and all of the Eighth Amendment precedents cited in *Caldwell* were conspicuous features of the constitutional landscape that was presented to a state court at the time when Robert Sawyer's conviction became final. *See Caldwell*, 472 U.S. at 323, 339-341 (Eighth Amendment precedents without exception predate 1984). A consideration of the principles and applications contained within these precedents reveals that *Caldwell* broke no new ground and imposed no new obligation on the states. Rather, *Caldwell* was dictated by its precedents because it simply applied "well-established constitutional principle[s] to govern a case which [was] closely analogous to those which [were] previously considered in the prior case law." *Mackey* v. *United States*, 401 U.S. at 667, 695 (1971) (separate opinion of Harlan, J.), *quoting Desist* v. *United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting) (quoted in *Penry*, 109 S. Ct. at 2944.)

2. At The Time Robert Sawyer's Conviction Became Final, State Courts Would Have Found The *Caldweil* Rule Rooted In *Woodson* v. *North Carolina*, *Gardner* v. *Florida*, *Lockett* v. *Ohio*, *Eddings* v. *Oklahoma*, *California* v. *Ramos*, and *Zant* v. *Stephens*.

In considering the Eighth Amendment landscape in 1984, a state court would have found the *Caldwell* outcome both predictable and unexceptional. The only alternative result would

have been to hold that a prosecutor could always present false and misleading information about the non-finality of a death verdict to a jury, as long as the record contained boilerplate references to the fact that jury's responsibility was to come to a life or death verdict. *See Caldwell*, 472 U.S. at 349-352 (Rehnquist, J., dissenting) (describing the alternative approach whereby boilerplate remarks may be found to cure all false and misleading remarks that fall short of an express assertion that appellate courts correct erroneous death verdicts). Since these sorts of boilerplate references are likely to exist in every death penalty case, a state court would have been compelled to choose between (a) tolerating a significant risk of jury misunderstanding of its sentencing powers as consistent with the Eighth Amendment, or (b) adopting the *Caldwell* rule. Under this Court's precedents, there was strong support for adopting *Caldwell*, and scant support for adopting the alternative of tolerating false and misleading information as a sentencing factor that could lead to mistaken death verdicts.

There were two aspects of this Court's Eighth Amendment precedents that would have provided guidance to a state court faced with the decision whether to adopt a "*Caldwell*" solution before *Caldwell* itself was decided. One was a consistent set of four broad Eighth Amendment principles that were consistently reaffirmed throughout the era from 1976 to 1984.

The first of these principles established, as an indispensable prerequisite to a reliable death verdict, that the sentencer be able to consider and give effect to all relevant characteristics of the offense and the offender, in order to reach an individualized sentencing determination. *See California* v. *Ramos*, 463 U.S. 992, 1000-1001 & n.13 (1983); *Eddings* v. *Oklahoma*, 455 U.S. 104, 112 (1982) (plurality opinion); *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U.S. 349, 364 (1977) (White, J., concurring); *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). *See also Caldwell*, 472 U.S. at 330-331. Second, the cases established that a verdict required a higher degree of "reliability" in the death sentencing process than in other contexts, because of the finality of the extreme penalty. *See Zant* v. *Stephens*, 462 U.S. 862, 884-885 (1983); *Eddings*, 455 U.S. at 110 (plurality opin-

ion); *Lockett*, 438 U.S. at 604 (plurality opinion); *Gardner*, 430 U.S. at 364 (White, J., concurring); *Woodson*, 428 U.S. at 305 (plurality opinion). *Accord*, *Caldwell*, 472 U.S. at 323, 330, 340.

A third broad principle in this Court's precedents emphasized the vital nature of careful appellate scrutiny and sensitivity to error, as safeguards for insuring that no improper factors interfered with individualization of sentences and reliability of verdicts. *See California* v. *Ramos*, 463 U.S. at 998-999 & n.9 (citing cases). *Accord*, *Caldwell*, 472 U.S. at 329. A fourth principle emphasized that the "risk" of unreliability was itself an Eighth Amendment harm, whenever such a risk was created by errors that interfered with the sentencer's individualization of death verdicts. *See Zant*, 462 U.S. at 885; *Eddings*, 455 U.S. at 118-119 (O'Connor, J., concurring); *Lockett*, 438 U.S. at 605 (plurality opinion); *Gardner*, 430 U.S. at 359 (plurality opinion). *Accord*, *Caldwell*, 472 U.S. at 330-333 (focusing on the dangers and risks of unreliability inherent in *Caldwell* error).

A state court faced with these four broad principles could not plausibly conclude that settled Eighth Amendment jurisprudence would permit it to condone false and misleading information about the non-finality of a death verdict. Rather, this Court's emphasis on careful appellate court scrutiny of errors that pose a risk of unreliability would lead a state court to reason that *Caldwell* errors should be cause for resentencing hearings. State courts before *Caldwell* would have understood that *Caldwell* error required Eighth Amendment correction, because it creates the risk of unreliable death sentences through misguided use of the death penalty by sentencers who misunderstand their responsibility.

Justice Harlan's telling phrase about "awesome responsibility" described the aspiration for sentencer behavior that was at the heart of the Court's acceptance of the death penalty. *Compare Caldwell*, 472 U.S. at 329-330. This responsibility included the burden of being the only decisionmaker who was obligated to take all mitigating circumstances into account in making the decision whether a defendant should live or die.

Accord, *Caldwell*, 472 U.S. at 329-333. Undermining the sentencer's responsibility therefore threatened the Eighth Amendment premise that:

> It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice, or emotion.

Gardner, 430 U.S. at 358 (plurality opinion). Sentencers deluded about their responsibilities cannot deliver death verdicts based on reason.

In addition to these four broad Eighth Amendment principles pointing to the *Caldwell* ruling, there were two narrower principles in this Court's precedents that would lead state courts to find the risks of unreliability from *Caldwell* error to be "unacceptable and incompatible with the commands of the Eighth Amendment and the Fourteenth Amendment." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring) (quoting *Lockett*, 438 U.S. at 605 (plurality opinion)). This Court's actual applications of these two narrow principles would lead a state court to believe that *Caldwell* error was unacceptable, both because it interfered with a sentencer's responsible consideration of mitigating evidence, and because it interjected false information into a sentencer's deliberations and thereby tainted their reliability.

First, the broad *Woodson* principle that individualized mitigating evidence should be considered by a sentencer had evolved into the narrower *Lockett* principle that no sentencer could be precluded from considering such evidence. *Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 604. The application of this principle in *Lockett* and *Eddings* made it clear that preclusion of the informed consideration of mitigating evidence was an Eighth Amendment violation, no matter what means were used to effect that preclusion. *Lockett*, 438 U.S. at 608 (condemning a statutory bar that effected preclusion); *Eddings*, 455 U.S. at 114-115 (condemning sentencer misunderstanding or jury instructions that effect preclusion). The result of preclusion was the risk of misunderstanding by the sentencers of their responsibilities to consider fully all mitigating evidence.

This risk was the constitutional harm remedied in *Lockett* and *Eddings*.

Under *Woodson*, *Lockett* and *Eddings*, it would be clear to a state court that a prosecutor could not argue constitutionally to jurors that they should take no account of mitigating evidence in deliberating on a death verdict. By analogy, a *Caldwell* argument, disparaging the jurors' attending to mitigation by falsely informing them that they did not have the ultimate responsibility for assessing mitigating circumstances, would have fared no better constitutionally. State courts consistently were urged to look behind the form of arguments and instructions, and consider the actual effect that words or messages would have on lay jurors. *See, e.g., Zant*, 462 U.S. at 888-889 (emphasizing the actual effect a jury instruction would have on lay jurors in context); *Ramos*, 463 U.S. at 1002-1003 & n.17 (same). *Accord, Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring) (emphasizing the misleading nature of technically accurate *Caldwell* arguments about appellate review, because of laypersons' lack of appreciation for its limited nature). The effect of misleading jurors concerning their responsibility to act as the final arbiter of death would be to create a risk of their misunderstanding also their responsibility to act as the authoritative evaluators of mitigating evidence. *See also Caldwell*, 472 U.S. at 330-331 & 332.

A second set of narrow Eighth Amendment principles also dictated that state courts view *Caldwell* error as creating an unacceptable risk of unreliable death verdicts. Both *Ramos* and *Zant* counseled state courts to consider the accuracy of sentencing information that was provided to the jury, in assessing the constitutionality of the procedure which provided such information. *Ramos*, 463 U.S. at 1011 (stressing the accuracy of a challenged instruction); *Zant*, 462 U.S. at 887 (stressing that the accuracy of the aggravating circumstance at issue was "unchallenged.") The *Ramos* and the *Zant* opinions clearly implied that false sentencing information could not be upheld under the rationales used to uphold true information. *See Ramos*, 463 U.S. at 1004, 1009, 1012 (repeatedly emphasizing accuracy of instruction); *Zant*, 462 U.S. at 887 n.23 (noting that even non-capital sentences must be set aside when based on

"misinformation of constitutional magnitude," citing *United States* v. *Tucker*, 404 U.S. 443, 447-449 (1972) and *Townsend* v. *Burke*, 334 U.S. 736, 740-741 (1948)). The impropriety of allowing false information to be presented to a sentencer was also established in *Gardner*, where this Court prohibited the sentencer's use of undisclosed and unchallengeable, and hence potentially false information. *Gardner*, 430 U.S. at 360-362 (plurality opinion); *id.* at 363-364 (White, J., concurring).

Given the false and misleading qualities of *Caldwell* argument, a state court would conclude that the proper remedy for the interjection of this misinformation into jury deliberations was a resentencing hearing. Such misinformation could not be deemed acceptable under *Ramos*, or *Zant*. Indeed, information with only the potential to be false had been condemned in *Gardner*. Additionally, this misinformation about a sentencer's authority posed the danger of unreliable death verdicts under *Woodson*, *Lockett*, and *Eddings*. Jurors' misunderstanding of their final responsibility for assessing mitigating evidence would deprive the defendant of an individualized verdict, "based on a process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings*, 455 U.S. at 118 (O'Connor, J., concurring). *See also id.* at 115 n.10 (plurality opinion) ("*Lockett* requires the sentencer to listen.")

These Eighth Amendment precedents established both a need and a means to erect a safeguard against the harmful consequences of *Caldwell* argument. By ordering resentencings, the state courts provided an incentive for prosecutors to avoid false and misleading *Caldwell* arguments and for trial judges to act swiftly to countermand a prosecutor's misinformation with correct instructions about the limitations of appellate court powers. *See Caldwell*, 472 U.S. at 340-341 n.7 *and see id.* at 343 (O'Connor, J., concurring) (describing need for explicit correction of misinformation). Had the state appellate courts failed to order resentencings on the grounds that boilerplate references to juror responsibility could "cure" *Caldwell* violations, they would have created no such incentives. Had the state courts adopted the view that *Caldwell* error could be tolerated in such cases of boilerplate "cures," their

decisions would have contradicted this Court's explicit and implicit directives in prior case law. It is little wonder that after *Furman*, the state courts overwhelmingly endorsed *Caldwell* in capital cases for the same reasons that would lead this Court to ratify their views in 1985.[4]

---

[4] *See, e.g., Ward* v. *Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985) (remarks condemned, reversal required, remarks divert jurors from true responsibility for death verdict by implying responsibility will fall elsewhere); *Ice* v. *Commonwealth*, 667 S.W.2d 671, 676 (Ky.), *cert. denied*, 469 U.S. 860 (1984) (remarks condemned, reversal required, remarks convey to the jurors that their awesome responsibility is lessened because the decision is somehow not final); *Wiley* v. *State*, 449 So.2d 756, 762 (Miss. 1984), *cert. denied*, 429 U.S. 906 (1986) (remarks condemned, reversal required, remarks lessen individual juror's sense of awesome responsibility for fate of defendant, and give jurors false comfort that they have advisory role, when "all notions of justice" require jurors to appreciate the gravity of their decision); *Williams* v. *State*, 445 So.2d 798, 811-812 (Miss. 1984), *cert. denied*, 469 U.S. 1117 (1985) (remarks condemned, reversal required, remarks give jury false comfort and lessen awesome responsibility); *State* v. *Robinson*, 421 So.2d 299, 233-234 (La. 1982) (remarks condemned, reversal required, remarks lessen jurors' awesome responsibility, divert attention from sentencing issue of appropriateness of death, mislead lay jurors about the powers of appellate courts, and interject irrelevant matters into the deliberations); *State* v. *Willie*, 410 So.2d 1019, 1033-1035 (La. 1983), cert. denied, 465 U.S. 1051 (1984) (remarks condemned, reversal required, remarks diminish jurors' responsibility and sense of accountability); *State* v. *Jones*, 296 N.C. 495, 251 S.E.2d 425, 427-429 (1979) (remarks condemned, reversal required, remarks will be likely to result in jurors' reliance on the Supreme Court for ultimate determination of the sentence); *State* v. *Gilbert*, 273 S.C. 690, 258 S.E.2d 890, 894 (1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); *State* v. *Tyner*, 273 S.C. 646, 258 S.E.2d 559, 566 (1979) (remarks condemned, reversal required, remarks imply responsibility for death is lessened, and divert the jury from deciding the punishment on the evidence); *Hawes* v. *State*, 240 Ga. 327, 240 S.E.2d 823, 839 (1977) (remarks condemned, reversal required); *Fleming* v. *State*, 240 Ga. 142, 240 S.E.2d 37, 40 (1977), *cert. denied*, 444 U.S. 885 (1979) (remarks condemned, reversal required, remarks divert jury from basing verdict on evidence, suggest jurors' heavy burden can be passed on to appellate court, and have unusual potential for corrupting the sentencing process); *State* v. *White*, 286 N.C. 395, 211 S.E.2d 445, 450 (1975) (remarks condemned, reversal required, remarks suggesting that jurors share responsibility with others for death verdict are prejudicial, remarks are intended to overcome natural reluctance to give a death verdict, lay jurors cannot understand the technicalities of the fact-or-law review distinction); *Prevatte* v. *State*, 233 Ga. 929, 214 S.E.2d 365, 367-368 (1975) (remarks condemned, reversal required, remarks encouraged jury to take less than full responsibility for its awesome task, and remarks may have influenced the jury to give death when unbiased judgment would have given life, as jurors weigh imponderables in sentencing deliberations); *State* v. *Hines*, 286 N.C. 377, 211 S.E.2d 201, 204-207 (1975) (remarks condemned, reversal required, remarks would dilute solemn obligation of jury, which has sole responsibility for death verdict).

A striking aspect of the state courts' endorsement of the *Caldwell* solution is the similarity of their reasoning to the reasoning that was ultimately adopted in the *Caldwell* opinion. Louisiana's own "*Caldwell*" decisions provide an apt example. *See, e.g., State* v. *Robinson*, 421 So.2d 229 (La. 1982); *State* v. *Willie*, 410 So.2d 1019 (La. 1982). Every one of the Louisiana Supreme Court's rationales for condemning prosecutorial references to appellate review in *Willie* and *Robinson* was ratified in *Caldwell*.[5] Conversely, each of the distinctive substantive

[5] Four rationales for the *Caldwell* rule are prefigured with clarity in the Louisiana decisions. First, remarks about appellate review can mislead laypersons. *Compare Caldwell*, 472 U.S. at 330, 331, *with Robinson*, 421 So.2d at 234. Second, these misleading remarks divert a jury's attention from the sentencing issue, and interject irrelevant matters into the jurors' weighing of sentencing criteria. *Compare Caldwell*, 472 U.S. at 331-332, *with Robinson*, 421 So.2d at 233-234. Third, such references also suggest that a juror's awesome responsibility may be lessened. *Compare Caldwell*, 472 U.S. at 330, 333, *with Robinson*, 421 So.2d at 233, *and Willie*, 401 So.2d at 1034. Fourth, it is imperative that the jurors' discretion in a capital case should be protected from the influence of such arbitrary factors, because jurors are supposed to exercise discretion with the appreciation that they are accountable for the death verdict. *Compare Caldwell*, 421 U.S. at 329-333, *with Willie*, 410 So.2d at 1035.

ingredients of *Caldwell's* rule was also mirrored in the Louisiana case law.

A second striking aspect of the state courts' endorsement of the *Caldwell* rule is their consensus that all of the distinctive ingredients of *Caldwell* were necessary in order to achieve an effective solution to the *Caldwell* problem.[6] State courts

---

[6] For example, the distinctive ingredients of *Caldwell's* rule are mirrored in the Louisiana case law that anticipated the arrival of the rule. The Louisiana Court's ban on false and misleading messages which suggest that the jurors' "awesome responsibility is lessened by the fact that their decision is not the final one" is matched by the *Caldwell* Court's ban on messages that lead the jury "to believe that responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Compare State* v. *Berry*, 391 So.2d 406, 418, *with Caldwell*, 472 U.S. at 320. The Louisiana Court's requirement that improper comments be more than brief or innocuous is matched by *Caldwell's* requirement that remarks should be "focused, unambiguous, and strong." *Compare State* v. *Knighton*, 436 So.2d 1141, 1158 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984) *with Caldwell*, 472 U.S. at 340. The Louisiana Court's premise that new hearings must be afforded where "we cannot say that the jury's sentencing decision was unaffected" by misleading prosecutorial remarks is echoed in *Caldwell's* conclusion that reversal is necessary where "we cannot say that [the argument] had no effect on the sentencing decision." *Compare Robinson*, 421 So.2d at 234, *with Caldwell*, 472 U.S. at 341. The Louisiana Court's blueprint for *Caldwell* error is no different from the blueprint developed by other state courts in the pre-*Caldwell* era. *See, e.g.*, cases cited in note 4 *supra*. For example, with regard to the proper correction standard for *Caldwell* error, the Kentucky Court held that "should any inadvertent reference implying a dimunition [sic] of the jury's duty in fixing a death penalty creep into any case, the trial judge should immediately inform the jury that their duty to fix the death penalty should be considered as if there were no possibility of review by any source." *Ward* v. *Commonwealth*, 695 S.W.2d 404, 408 (Ky. 1985). *Compare Caldwell*, 472 U.S. at 339-340, 340-341 n.7; id. at 343 (O'Connor, J., concurring) (describing need for express correction). With regard to the presumed prejudicial effect of *Caldwell* error, some state courts actually expressed the "presumed effect" concept in so many words. *See, e.g., State* v. *Robinson*, 4421 So.2d at 234 (La. 1982) ("we cannot say that the jury's sentencing decision was unaffected" by the misleading argument); *State* v. *Jones*, 251 S.E.2d 425, 429 (N.C. 1979) (any reference "which would have the effect of minimizing in the jury's minds their role" is precluded, as "such reference will, in all likelihood, result in the jury's reliance" on an appellate court); *Prevatte* v. *State*, 214 S.E.2d 365, 368 (Ga. 1975) (a reference to appellate review is likely to be cause for reversal of a death verdict because "in the weighing of imponderables it cannot be concluded that the jury were not influenced by such statements"). In other cases, the state courts simply applied the "presumed effect" concept by reversing death verdicts because of bad arguments without inquiring into the actual impact of the argument upon the verdict in light of the totality of the remarks on the record or the evidence. *See, e.g.*, cases cited in note 4 *supra*.

understood that false and misleading information about the non-finality of a jury's death verdict created a risk of Eighth Amendment harm that must affirmatively be dispelled. They understood that because under the Eighth Amendment precedents, this risk was "unacceptable," it could not be brushed aside on the basis of assumptions that no prejudice accrues to a defendant as long as boilerplate remarks about responsibility are present in the record. Thus, once the state courts found that false and misleading information was conveyed to a capital jury in a clear and direct way and was not corrected in a clear and direct way, they concluded that the presumptive effect was one of prejudice. Or, as this Court was to state in a similar way in *Caldwell* itself, once error is clear and is not corrected, reversal is required "[b]ecause we cannot say that this [error] had no effect on the sentencing decision." *Id.* at 472 U.S. at 341.

Caldwell's rule was thus foreseen by the state courts to be dictated by the Eighth Amendment precedents. Those precedents provided no support for a contrary rule. No prosecutor in the pre-*Caldwell* era could have relied on the notion that false and misleading information about appellate court review was proper argument. No state court could have relied on any Eighth Amendment precedent to support the idea that such misleading information was harmless to the sentencing process. *Teague* suggests that the absence of any basis for reliance goes to the heart of the retroactivity inquiry, because the very

purpose of non-retroactivity is to avoid the frustration of state courts that have "faithfully appl[ied] existing constitutional law" to solve particular problems. *Teague*, 109 S. Ct. at 1075.[7]

This Court's pre-*Teague* retroactivity case law also supports a holding that *Caldwell* was "old law" because it was predictable according to the principles of prior Eighth Amendment decisions. *See, e.g., Solem* v. *Stumes*, 465 U.S. 638, 646 (1984); *United States* v. *Johnson*, 457 U.S. 537, 549-50 (1982). *Caldwell* bears none of the earmarks that qualified various cases in the pre-*Teague* era for non-retroactive application on the grounds that state courts and prosecutors relied on prior precedents, sanctioned practices, or "longstanding and widespread practices . . . which a near-unanimous body of lower court authority has expressly approved." *Johnson*, 457 U.S. at 551.

One final piece of evidence that Eighth Amendment precedents provided no support for a different approach than *Caldwell* took to the *Caldwell* problem is provided by the prosecutor's arguments in the *Caldwell* case itself. When the prosecutor in *Caldwell* needed authority to contest the soundness of the *Caldwell* rule, he was forced to reach back to the

[7] The Louisiana Supreme Court's reaction to the *Caldwell* decision exemplifies that of a state court which views *Caldwell* as an old, and unremarkable piece of law dictated by Eighth Amendment principles. In 1988 the Court noted that *Caldwell* "did not change our previous case law," and therefore rejected on the merits the *Caldwell* claim of a post-conviction petitioner whose pre-*Caldwell* claim had been rejected on appeal. *State ex rel. Busby* v. *Butler*, 538 So.2d 164, 173 (La. 1988). In *Busby*, the Court stated that the defendant raised an "Eighth Amendment" claim, and stated, "We addressed this issue on direct appeal [before *Caldwell*]." Likewise, in its first two post-*Caldwell* cases, the Louisiana Court relied upon its own pre-*Caldwell* cases for the relevant standard to be applied, and treated *Caldwell* as supplemental authority. *State* v. *Jones*, 474 So.2d 919, 930-932 (La. 1985), *cert. denied*, 476 U.S. 1178 (1986); *State* v. *Clark*, 492 So.2d 862, 870-871 (La. 1986). *See also State* v. *Smith*, 554 So.2d 676, 685 (La. 1989) (citing *Caldwell* and Louisiana pre-*Caldwell* cases interchangeably).

pre-*Gregg* era and invoke the Due Process case of *Donnelly* v. *DeChristoforo* as precedent for a "boilerplate" correction approach to *Caldwell* error. *See Caldwell*,472 U.S. at 337-340 (rejecting this approach and discussing *Donnelly*, 416 U.S. 637 (1974)). *See also id.* at 335-336 *and see id.* at 341-342 (O'Connor, J., concurring) (both opinions rejecting the unsupportable claim that *Ramos* implied that states are free to expose sentencing juries to any information and argument concerning postsentencing proceedings).

The Fifth Circuit majority below incorrectly held *Caldwell* to be "new law" under *Teague* because it took the very same approach that the prosecutor did in his losing argument in *Caldwell*. The majority ignored this Court's direction in *Penry*, and did not consider whether *Caldwell* was dictated by the Eighth Amendment precedents that animated its reasoning. Instead, the Fifth Circuit majority reached back to *Donnelly* v. *DeChristoforo* and found that *Caldwell's* Eighth Amendment rule was new by comparison to *Donnelly's* 1974 Due Process doctrine. *Sawyer*, 881 F.2d at 1282-1287, 1290-1293; *see, e.g., id.* at 1281 ("whether *Caldwell* is a new rule . . . [depends] upon the relation between *Caldwell* and *Donnelly*"). As we show in the following subsection, the Fifth Circuit's failure to find that *Caldwell* was "old law" is a mistake, and must be corrected by this Court, because that failure was based on an analysis that is inconsistent with *Teague*, with *Penry*, and with the *Caldwell* opinion.

3. The Fifth Circuit Majority Erred In Holding *Caldwell* "New Law" Because It Misinterpreted The *Teague* and *Penry* Decisions And Misapprehended The Relationship Between *Donnelly* v. *DeChristoforo* And *Caldwell*. The Majority's View Of *Caldwell* Must Be Rejected Because It does Not Reflect The Perspective Shared By State Courts Which Regarded *Donnelly* As Irrelevant To The *Caldwell* Problem In The Pre-*Caldwell* Era.

The majority below relied on three erroneous assumptions in rejecting the proposition that *Caldwell* was "old law." Had it not been led astray by these errors, it would have seen that

Caldwell deserves retroactive application as a case that simply applied well-established constitutional principles to govern the problem of false and misleading sentencing information. As the Fifth Circuit dissenters observed,

> Far from articulating an unanticipated principle of law or breaking with a past understanding of the law, *Caldwell* interpreted and followed directly the Court's own eighth amendment jurisprudence.
>
> . . . .
>
> If anything, Sawyer's claim that *Caldwell* followed eighth amendment jurisprudence consistently is stronger than Penry's for no precedent like *Jurek* existed in the *Caldwell* context to lead state courts to reach a conclusion different from the Supreme Court's holding in *Caldwell*.

Sawyer, 881 F.2d at 1298, 1299 (King, J., dissenting).

The Fifth Circuit majority's first error was to assume that *Penry's* retroactivity analysis is, in effect, good for one case only. *See Sawyer*, 881 F.2d at 1288, 1290. The analysis in *Penry* is not limited to the "unique" facts of *Penry* or a "unique" development in Texas law. Rather, retroactivity in *Penry* is analyzed in terms established in *Teague*, by beginning with Justice Harlan's understanding of old law. *Penry*, 109 S. Ct. at 2944. Evolving rules may be treated as old law when they simply apply established principles to govern analogous cases. *Id.*, *citing Mackey*, 401 U.S. at 695 (separate opinion of Harlan, J.). The first step of the Harlan inquiry in *Penry* is a comparison of the rule Penry seeks with the Eighth Amendment premise that individualized sentencing is "indispensable" to reliable death verdicts. *Penry*, 109 S. Ct. at 2945, *citing Woodson*, 428 U.S. at 304. The second step is a comparison of Penry's claim with the obligations imposed in *Jurek*, *Lockett*, and *Eddings* to interpret state law so as to allow sentencing juries to consider relevant mitigating evidence. *Penry*, 109 S. Ct. at 2946 (analyzing cases including *Jurek* v. *Texas*, 428 U.S. 262 (1976)). The last step of retroactivity analysis is an analysis that the *Lockett* and *Eddings* principle that bars preclusion of the sentencer's consideration of mitigating evidence may be applied to the analogous claim in *Penry*. *Penry*, *id.* at 2946-2947.

By disregarding this analysis, the Fifth Circuit majority stood *Teague* on its head. The essence of *Teague* is that a federal court must consider how the state courts would have viewed a *Caldwell* issue at the time Robert Sawyer's conviction became final. *See Teague*, 109 S. Ct. at 1073-1075. An issue of false and misleading information being presented to a sentencing jury would have required state courts to examine this Court's specialized Eighth Amendment precedents dealing with state death penalty questions between the time of *Gregg* and that of *Zant* and *Ramos*. Yet the Fifth Circuit majority declined to consider these precedents, and reached back to the pre-*Gregg* era to take guidance from the Due Process doctrine in *Donnelly* instead. Thus, by disregarding *Penry*, the majority began its search for *Caldwell* precedents, in the name of *Teague*, by eliminating the entire Eighth Amendment landscape where such precedents were located. *Sawyer*, 881 F.2d at 1290 (*Teague* can be followed by treating *Penry* as a "special" case); *id.* at 1290-1291 (holding *Caldwell* to be a new rule without consideration of its Eighth Amendment precedents).[8]

The majority's failure to heed *Penry's* guidance produced a view of the *Caldwell* rule that completely fails to take account of the state courts' views and decisions. No state court would similarly have ignored the Eighth Amendment case law in addressing a *Caldwell* problem, or have reached back to *Donnelly* in preference to Eighth Amendment precedents. This is evident for two reasons. First, this Court had expressly advised state courts in the post-*Gregg* era that they should not rely on old Due Process cases when considering death sentencing procedures. *See Gardner*, 430 U.S. at 356-358 (rejecting *Williams* v. *New York*, 337 U.S. 241 (1949) as inapposite). Thus, no state court would have considered *Donnelly's* Due

---

[8] The Fifth Circuit majority stated that Robert Sawyer "has two arguments" that *Caldwell* is old law, and then rejected them. *Sawyer*, 881 F.2d at 1291. The majority failed to mention that Robert Sawyer consistently argued that *Caldwell* was descended from, and dictated by, Eighth Amendment precedents. *See* Petitioner's Supplemental Circuit Brief at 15-19, and Petitioner's Supplemental Circuit Reply Brief at 3-7.

Process doctrine to be the controlling law on the *Caldwell* problem.

Second, no state court in the pre-*Caldwell* era did, in fact, rely on *Donnelly* as a relevant doctrine for addressing the *Caldwell* problem. *Donnelly* was cited by courts in twenty-seven states in at least seventy-six cases in that era. Yet in no case did any state court refer to *Donnelly* analysis in assessing or rejecting a *Caldwell* claim. *See* cases cited in Appendix B, *infra*. Notably, *Donnelly* was not discussed or even cited in any of the fourteen state decisions embracing the *Caldwell* rule in capital cases between *Furman* and *Caldwell*. *See* cases in note 4 *supra*. The state courts knew that the *Caldwell* problem was an Eighth Amendment problem in the post-*Gregg* era. The Fifth Circuit majority missed this point entirely by failing to take proper account of the state courts' perspective.

Finally, the Fifth Circuit majority's decision to eliminate the Eighth Amendment landscape caused it to ignore the evidence of *Caldwell's* ancestry presented in the *Caldwell* opinion itself. This Court's justifications for the *Caldwell* rule are anchored in Eighth Amendment analysis with repeated citations to precedents such as *Ramos*, *Eddings*, *Lockett*, *Gardner*, and *Woodson*. *See Caldwell*, 472 U.S. at 323, 329-333 & 329 n.2, 335-336, 340 & 340-314 n.7; *id.* at 342, 343 (O'Connor J., concurring). Yet the majority did not analyze *Caldwell's* relationship to any of these precedents upon which its holding and reasoning relied. By contrast, the Fifth Circuit dissenters correctly followed *Penry* and *Teague*, by tracing the genesis of *Caldwell* through all of the relevant Eighth Amendment precedents, and thereby concluded that *Caldwell's* rule was old law. *Sawyer*, 881 F.2d at 1298.[9]

The second error of the Fifth Circuit majority was to assume that the *Teague* opinion calls for ignoring state court implementation of the *Caldwell* principle in the pre-*Caldwell* era for the purpose of assessing the "new law" status of *Caldwell*. *See Sawyer*, 881 F.2d at 1290-1291. This error is based upon the majority's belief that consideration of state court law "cannot be squared with the Supreme Court's view that it created a new rule in *Ford* v. *Wainwright*." *Sawyer*, 881 F.2d at 1290 (referring to *Ford*, 477 U.S. 399 (1986)). However, there is no reason to think that *Ford* cannot be squared with this Court's retroactivity analysis—both in *Teague* and in pre-*Teague* cases—which consistently has treated state court decisions as a relevant source for understanding whether a rule is old law or new law. *Teague* does not offer *Ford* as an example of rejection of state-court decisions. *Teague* simply cites *Ford* as an example of a "new rule," no doubt because *Ford* overruled *Solesbee* v. *Balkcom*, 339 U.S. 9 (1950). *See Teague*, 109 S. Ct. at 1070. Thus, there is nothing in either *Ford* itself or *Teague's* reference to *Ford* to suggest that state court decisions should not be considered in determining whether *Caldwell* is old law or new law.

[9] *Compare Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1288-1291 (10th Cir. 1989) (*en banc*) (holding that *Caldwell* is "new law" under *Teague* while failing to consider any of its relevant Eighth Amendment precedents, and relying instead on the *Caldwell* dissent's view of *Caldwell's* lack of precedents). *Hopkinson* is wrong for the same reasons that the Fifth Circuit majority is wrong about *Caldwell*.

The Fifth Circuit dissenters correctly assessed the positive nature of state court support for the *Caldwell* rule in the pre-*Caldwell* era. This support demonstrates that *Teague* retroactivity policies will not be violated if *Caldwell* is applied retroactively, because the expectations of state courts will not be injured by this application. As Judge King stated,

> [The] widespread anticipation of *Caldwell* strongly suggests that the Supreme Court's subsequent decision in that case maintained a continuity with and fulfilled clearly discernible principles in eighth amendment jurisprudence.

Sawyer, 881 F.2d at 1301 (King J., dissenting). *Compare Solem*, 465 U.S. at 647-649 (considering how a traditional basis for non-retroactivity is the need for state courts and prosecutors to be entitled to rely upon old law, and not be forced to anticipate unexpected new rules).

The third error of the Fifth Circuit majority pervades its entire retroactivity analysis and underlies its failure to consider *Caldwell's* roots in Eighth Amendment precedents. The majority incorrectly assumes that because *Caldwell* is "dif-

ferent" from *Donnelly*, it must be an unpredictable "new law" evolution away from the root of *Donnelly*. *See Sawyer*, 881 F.2d at 1281, 1282, 1284, 1285. The source of this error may be found in the State's argument on the merits of this case in the En Banc proceedings before *Teague* was decided. The State there urged the Fifth Circuit to find that *Caldwell* was a direct descendant of *Donnelly*. It argued that *Donnelly*, *Caldwell*, and *Darden* v. *Wainwright* all prescribe the same standard for assessing *Caldwell* error—a standard which would allow uncorrected *Caldwell* violations to be held harmless as long as a defendant could not prove "prejudice" on the basis of the entire record. *See, e.g., Sawyer*, 881 F.2d at 1282, 1284, 1285 (describing State arguments); *Sawyer*, 848 F.2d 582, 599 n.15 (5th Cir. 1988) (panel opinion, upholding State view), *vacated in part by* 881 F.2d 1273 (5th Cir. 1989) (en banc).

Robert Sawyer's merits argument below, by contrast, observed that *Donnelly* and *Darden* reflect a distinctly different substantive doctrine than *Caldwell*. The *Caldwell* rule has three distinctive features. It establishes an Eighth Amendment ban on the particular subject of false and misleading argument about the non-finality of the jury's responsibility for death verdicts. This ban is based on "risk" analysis, and its formula holds that the risk of unreliable verdicts becomes unacceptable when *Caldwell* violations are based on focused, unambiguous and strong messages of a misleading nature that go uncorrected in express terms. Given the risk of prejudice in every case from an error of this particular kind, resentencing hearings must be granted because it cannot be said that the error had "no effect" on the verdict. *See Caldwell*, 472 U.S. at 323-326, 328-335, 337-341. By contrast, *Darden* and *Donnelly* contain no specific prohibitions; both cases simply hold that whenever improper prosecutorial argument of any ordinary kind occurs, it should not be cause for reversing a verdict unless the trial was thereby "infected" with unfairness in light of the entire record. *See Darden*, 477 U.S. at 181, *citing Donnelly*, 416 U.S. 637. *See also Darden*, 477 U.S. at 183-184 n.15 (noting that *Caldwell* doctrine is relevant only to *Caldwell* types of comment, not to claims of ordinary misconduct that are subject to *Darden-Donnelly* analysis). Indeed, the *Caldwell* Court expressly put *Donnelly* aside as inapplicable to *Caldwell* types

of comment concerning information about death sentencing procedures. *See Caldwell*, 472 U.S. at 337-341 & 340-341 n.7.

The Fifth Circuit majority did not confront the fact that the *Caldwell* Court itself rejected the applicability of *Donnelly* to the *Caldwell* issue. Instead the majority assumed that *Donnelly* is the starting point for *Caldwell* analysis. This is plainly wrong both historically and analytically.[10] The Fifth Circuit dissenters had no trouble discerning that *Caldwell* does not derive from *Donnelly*. *Sawyer*, 881 F.2d at 1298-1299. State courts had no trouble discerning that *Donnelly* was inapposite to the *Caldwell* problem.

And once it is perceived that the Eighth Amendment precedents, not *Donnelly*, provide the template of relevant jurisprudence for assessing whether *Caldwell* is "old law' or "new law", the answer to that question becomes plain. As the Fifth Circuit dissenters determined, based on the Eighth Amendment precedents "it is difficult to imagine the Court reaching any other conclusion" than the *Caldwell* rule, whether at the time of *Caldwell*, or at the time Robert Sawyer's conviction became final. *Sawyer*, 881 F.2d at 1298 (King, J., dissenting).[11]

---

[10] The Fifth Circuit majority also recharacterizes Robert Sawyer's arguments under *Caldwell*, and makes them sound as though they embraced the Fifth Circuit's own flawed view of *Donnelly* as the starting point for *Caldwell* analysis. *See, e.g., Sawyer*, 881 F.2d at 1284, 1285, 1293 (Sawyer "argues that *Caldwell* modifies *Donnelly* by mixing in traces of the regard for jury decision- making so powerfully articulated in *McGautha*"; "we agree with Sawyer that *Caldwell* must be read in light of *McGautha*"; "as Sawyer contends, the *Donnelly* issue of fundamental fairness is subsumed in the threshold question of whether there was *Caldwell* error"; "what Sawyer seeks to rely on is *Caldwell's* modification of *Donnelly* in light of the ideals discussed in *McGautha*"). These recharacterized arguments are nowhere found in the briefs submitted by Robert Sawyer.

[11] Perhaps the Fifth Circuit majority misapprehended *Caldwell* by viewing it through lenses tinted by the experience of federal judges in applying *Donnelly* analysis on a regular basis. *Donnelly* claims are made with some frequency. *See generally*, Genson & Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It*

B. When *Caldwell* Rights Are Violated, The Likelihood Of An Accurate Death Sentence Is Seriously Diminished, And The Fundamental Fairness That Must Underlie A Death Verdict Is Undermined. Therefore, The *Caldwell* Rule Vindicates Rights That Enjoy A Special Exemption From The Non-Retroactivity Rule Of *Teague* v. *Lane*.

1. According To *Teague's* Policies And Guidelines For Identifying Bedrock Procedural Elements Of Fundamental Fairness, The *Caldwell* Rule Constitutes Such An Element, Because It Is Essential To Preserve The Accuracy And Fairness Of Capital Sentencing Judgments By Juries.

Caldwell should be applied retroactively to Robert Sawyer's case because *Caldwell* violations "undermine the fundamental fairness that must underlie" a death verdict and "seriously diminish the likelihood of obtaining an accurate" death verdict. *Teague*, 109 S.Ct. at 1077. *See Penry*, 109 S.Ct. at 2944 (*Teague's* "fundamental fairness" exception to non-retroactivity rule applies in the capital sentencing context). According to *Teague* the concerns of finality and comity, which normally dictate non-retroactivity of new rules, must occasionally yield to the need for a complete guarantee of particular rights to all defendants. This Court should find that *Caldwell* falls within *Teague's* "fundamental fairness" exception because retroactive application of *Caldwell* would accord with the policies that appear to underlie that exception. In addition, *Caldwell* falls within the specific guidelines provided by *Teague* for identifying "bedrock procedural elements" of fundamental fairness.

First, there appear to be two policies that underlie *Teague's* exception to the non-retroactivity rule. The exception is justi-

---

Time to Start Prosecuting the Prosecutors?, 19 Loy. Chi. L.J. 39 (1987). True *Caldwell* violations, by contrast, are rare. *See, e.g., Wheat* v. *Thigpen*, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987) (the only grant of *Caldwell* relief to date in the Fifth Circuit). For other grants of *Caldwell* relief in the federal courts, *see Mann* v. *Dugger*, 844 F.2d 1446 (11th Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S. Ct. 1353 (1989); *Buttrum* v. *Black*, 721 F. Supp. 1268 (N.D. Ga. 1989); *Blanco* v. *Dugger*, 691 F. Supp. 308 (S.D. Fla. 1988).

fied by the fact that a new rule will occasionally reflect a new consensus of "judicial perceptions of what we can rightly demand of the adjudicatory process" in terms of fair procedures. *Teague*, 109 S.Ct. at 1076, *quoting Mackey*, 401 U.S. at 693-694 (separate opinion of Harlan, J.). Thus, after most states adopted the right to counsel for serious felonies, this Court considered it justifiable to impose the new rule on all the states as a Sixth Amendment requirement. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Retroactive application of this new rule was justified as well, suggests Justice Harlan, because a strong consensus existed among the states that the rule was necessary for the operation of a fundamentally fair Anglo-American system of criminal justice. *Cf. Duncan* v. *Louisiana*, 391 U.S. 145, 149-150 n.14 (1968).

A second *Teague* policy follows from this first one that supports retroactive application of rights that come to be regarded as fundamental by many states. When retroactive application of a new rule occurs, this special recognition of the rule will serve a state interest, namely the interest in federal ratification of a rule that most states regard as fundamental. Justice Harlan recognized the central role that states deserve to play in the development of rules of criminal procedure, and found it "intolerable" that the Supreme Court would "take to [itself] the sole ability to speak to" issues of constitutional law. *Mackey*, 401 U.S. at 680 (separate opinion of Harlan, J.) The retroactive application of a bedrock element that was foreshadowed as fundamental in state jurisprudence thus reaffirms the value of the states' views on fundamental rights.

It is plain that the retroactive application of *Caldwell* rights would serve the two policies behind *Teague's* recognition of the need for a "fundamental fairness" exception to its non-retroactivity rule. "*Caldwell*" rights for capital cases enjoyed broad support among the states for over 100 years before *Caldwell* was decided. *See* cases cited in note 4 *supra*, and note 13 *infra*. Many states also shared the judgment that *Caldwell* rights were needed in non-capital cases as well. *See* cases cited in note 13 *infra*. This Court's *Caldwell* decision was a ratification of a state consensus, based on the evolution of "judicial perceptions of what we can rightly demand" of the capital sentencing pro-

cess. The Fifth Circuit dissenters pointedly noted that the majority's refusal to apply *Caldwell* retroactively "devalues the importance of the dialogue by which state and federal courts articulate evolving federal constitutional norms." *Sawyer*, 881 F.2d at 1302 (King, J., dissenting).[12]

Additionally, quite apart from *Teague's* policies that support the "fundamental fairness" exception, the *Teague* opinion contains specific guidelines in the form of suggestions for identifying bedrock procedural elements of fundamental fairness in cases like Robert Sawyer's. First, *Teague* emphasizes the need for a rule to be accuracy-enhancing; second, the *Teague* Court assumes that the well-established lineage of a rule is relevant, as it states that bedrock procedures will be so "central" that "it [is] unlikely that many such components of basic due process have yet to emerge." *Teague*, 109 S. Ct. at 1077. Third, *Teague* provides a helpful citation of rights that already belong in the "bedrock" category, so that the *Caldwell* rule may be compared with those rights. The *Caldwell* rule ranks as fundamental under each one of these three implicit guidelines for selecting "fundamental fairness" rights.

First, the face of the *Caldwell* opinion makes plain that the *Caldwell* rule was dictated by a need to safeguard the "accuracy" of death verdicts. The opinion identifies four separate threats to the accuracy of verdicts arising from *Caldwell* violations. These threats include the danger that jurors will fail to make a proper assessment of mitigating evidence, and that they will use an advisory verdict symbolically to "send a message" of disapproval to the courts and the public. Two other threats are the danger that jurors will use a death verdict to transfer ultimate sentencing responsibility to the appellate courts, and that they will wish to defer to appellate judges as expert sentencers, in order to relieve their consciences of the

---

[12] The Fifth Circuit dissenters found that the state courts, like the Louisiana Court, adopted the *Caldwell* rule before *Caldwell* "to conform state law to perceived eighth amendment requirements," and found that it was irrelevant whether they were "conforming to an independent federal constitutional constraint articulated by the Supreme Court." *Sawyer*, 881 F.2d at 1301 (King, J., dissenting).

"awesome responsibility" of choosing between life and death. *See Caldwell*, 472 U.S. at 330-333. Bad *Caldwell* argument creates a "mistaken impression" about the jurors' role, "thereby creating an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously." *Id.* at 343 (O'Connor, J., concurring), *cited in Sawyer*, 881 F.2d at 1304 (King, J., dissenting).

Thus this Court's reasoning about the need for "reliable" death verdicts shapes the very substance of the *Caldwell* rule, and identifies it as a bedrock procedural requirement for fair death-sentencing hearings. Because *Caldwell* error gives rise to multiple serious threats to the reliability of a death verdict, the Court in *Caldwell* placed the burden on the State to show the harmlessness of any such error. *Caldwell* rights are worthy of "high esteem,"

> for the Supreme Court found *Caldwell* error to be so destructive of the fundamental right of a defendant assured by the eighth amendment to a reliable and accurate sentence that it presumed the error to be prejudicial unless the state had demonstrated otherwise.

Sawyer, 881 F.2d at 1304; *compare id.* at 1304-1305 & n.79-81 (contrasting *Caldwell* rights with other Eighth Amendment rights where prejudice is not assumed to exist solely on the basis of the substantive violation itself).

Second, the *Teague* opinion suggests that one earmark of bedrock elements of procedural fairness is an ancient lineage in the jurisprudence of criminal procedure. *See Teague*, 109 S. Ct. at 1077 ("we believe it unlikely that many [bedrock] components of basic due process have yet to emerge"). *Caldwell* rights enjoy such a lineage, as this Court noted in the *Caldwell* opinion. *See Caldwell*, 472 U.S. at 333-334 & nn. 4, 5. Many state courts before *Furman* created "*Caldwell*" rules to insure the reliability of sentencing hearings in capital trials, and some

states employed these rules in non-capital trials as well.[13] In

[13] For capital cases, *see, e.g., People* v. *Morse*, 60 Cal. 2d 631, 388 P.2d 33, 43-44, 36 Cal. Rptr. 201 (1964) (trial judge's instruction about his power to reduce a death sentence is condemned, reversal required, remarks weaken jury's sense of responsibility); *State* v. *Mount*, 30 N.J. 195, 152 A.2d 343, 352 (1959) (trial judge's remarks about appellate review condemned, reversal required, remarks weaken jury's sense of obligation in performance of its duties, and deprive the defendant of a fair determination on the issue of life or death); *Pait* v. *State*, 112 So.2d 381, 384 (Fla. 1959) (remarks condemned, reversal required, remarks suggest that jury can disregard its responsibility, and unreviewable nature of death verdict makes remarks especially prejudicial); *State* v. *Dockery*, 238 N.C. 222, 77 S.E.2d 664, 668 (1953) (remarks condemned, reversal required, remarks prejudiced the defendant's right to have the jury recommend life, and were calculated to induce the jury not to exercise its discretion to give a life sentence); *State* v. *Hawley*, 229 N.C. 167, 48 S.E.2d 35, 36 (1948) (remarks condemned, reversal required, remarks tend to disconcert the jury in fairly deliberating and arriving at a just verdict)); *Pilley* v. *State*, 247 Ala. 523, 25 So.2d 57, 59 (Ala. 1946) (remarks are condemned, because they lessened juror's sense of responsibility, but no reversal required where judge gave immediate correction); *People* v. *Johnson*, 284 N.Y. 182, 30 N.E.2d 465, 467 (N.Y. 1940) (remarks condemned, reversal required, remarks suggest jurors need not be greatly concerned about verdict); *State* v. *Biggerstaff*, 17 Mont. 510, 43 P. 709, 711 (1896) (remarks were reprehensible, and calculated to cause jurors to be less cautious in weighing evidence and less mindful of duties, and would be ground for reversal if issue were properly raised on appeal); *Vaughn* v. *State*, 24 S.W. 885, 889 (Ark. 1894) (remarks condemned, but no reversal where judge gave immediate correction); *State* v. *Kring*, 64 Mo. 591, 596 (Mo. App. 1877) (remarks condemned, reversal required, argument was calculated to induce the jury to disregard its responsibility for a death verdict, and even in the absence of an objection, the trial judge should have intervened to give prompt correction.)

For non-capital cases, *see, e.g., Borgen* v. *State*, 682 S.W.2d 620, 623-624 (Tex. App. 1984); *Howell* v. *State*, 411 So.2d 772, 774, 777 (Miss. 1982); *Simms* v. *State*, 492 P.2d 516, 523 (Wyo.), *cert. denied*, 409 U.S. 886 (1972); *Lyons* v. *Commonwealth*, 204 Va. 375, 131 S.E.2d 407, 409 (1963); *State* v. *Benjamin*, 309 S.W.2d 602, 605 (Mo. 1958); *Graham* v. *State*, 202 Tenn. 423, 304 S.W.2d 622, 624 (1957); *State* v. *Merryman*, 79 Ariz. 73, 283 P.2d 239, 241 (1955); *Gray* v. *State*, 191 Tenn. 526, 235 S.W.2d 20 (1950); *Commonwealth* v. *Balles*, 160 Pa. Super. 148, 50 A.2d 729 (1947); *Kelley* v. *State*, 210 Ind. 380, 3 N.E.2d 65, 74 (1936); *Bryant* v. *State*, 205 Ind. 372, 186 N.E. 322, 325 (1933) (judicial instruction); *Crobaugh* v. *State*, 45 Ohio, App. 410, 187 N.E. 243, 246 (1932); *Goff* v. *Commonwealth*, 241 Ky. 428, 44 S.W.2d 306, 308 (1931); *Davis* v. *State*, 200 Ind. 88, 161 N.E. 375, 383 (1928); *Taylor* v. *State*, 22 Ala. App. 428, 116 So. 415 (1928); *Osius* v. *State*, 96 Fla. 318, 117 So. 859, 861 (1928); *People* v. *Santini*, 221 App. Div. 139, 222 N.Y.S. 683, 686 (1927); *Plyler* v. *State*, 21 Ala. App. 320, 108 So. 83, 84 (1926); *Beard* v. *State*, 19 Ala. App. 102, 95 So. 333, 334 (1923); *Hammond* v. *State*, 156 Ga. 880, 120 S.E. 539, 541 (1923); *Murmutt* v. *State*, 67 S.W. 508, 510 (Tex. 1902); *Brazell* v. *State*, 33 Tex. Cr. R. 333, 26 S.W. 723, 724 (1894); *Crow* v. *State*, 33 Tex. Cr. R. 264, 26 S.W. 209, 212 (1894); *McDonald* v. *People*, 126 Ill. 150, 18 N.E. 817 (1888).

capital cases, the tradition that produced *Caldwell* dates from at least 1877. *See State* v. *Kring*, 64 Mo. 591, 596 (Mo. App. 1877).

The policies of *Teague* are not offended by the retroactive application of bedrock rights of ancient lineage. No injury is done to state courts' expectations concerning the future development of the law when old, familiar rights developed by the state courts themselves are ratified in constitutional doctrine. *Compare Teague*, 109 S. Ct. at 1075 (describing the injury to state interests when federal courts retroactively apply unanticipated rights). A rule recognized for over 100 years and adopted in many states as essential to the integrity of the jury's sentencing function is manifestly rooted in common conceptions of fundamental fairness. These conceptions make its acceptance into federal constitutional doctrine an expression of the continuity of basic values, not their sudden change. *Caldwell* springs, in other words, from enduring rather than ephemeral judgments about what fundamental fairness demands.

Third, the *Teague* opinion provides examples of fundamental fairness rights that would command retroactive application. *Teague*, 109 S. Ct. at 1077. One is the right against the knowing use of perjured testimony by a prosecutor. *See id., citing Rose* v. *Lundy*, 455 U.S. 509, 544 (1982) (Stevens, J., dissenting), *citing Mooney* v. *Holohan*, 294 U.S. 103 (1935). *Mooney* was a death case in which this Court condemned the contrivance of

convictions through the "deliberate deception" of a jury "as inconsistent with the rudimentary demands of justice" *Mooney*, 294 U.S. at 112. *Id.*

Caldwell violations offend the Constitution in the same ways and for the same reasons as *Mooney* violations. They create a danger of actual unreliability in the jury's verdict, resting as it does on false and misleading information. They also create an appearance of impropriety that undermines the legitimacy of the jury's decision-making process. When Robert Sawyer's prosecutor falsely told his sentencing jury that it was "merely making a recommendation," this duplicity jeopardized both the jury's verdict as an accurate indicator of its sentencing judgment and the basic integrity of the sentencing process in Robert Sawyer's case.[14]

Rights like those established in *Mooney* and *Caldwell* are properly deemed to be implicit in the concept of ordered liberty because they establish procedures that are essential preconditions to confidence in the rectitude of the criminal justice system. *See Teague*, 109 S. Ct. at 1077. By contrast, the rule invoked in *Teague* was not based on the "premise that every criminal trial, or any particular trial, [is] necessarily unfair" because the rule was not obeyed. *Teague*, 109 S. Ct. at 1077 (quoting *Daniel* v. *Louisiana*, 420 U.S. 31, 32 (1975)). *Caldwell* rights, however, are based upon precisely such a premise of unfairness, and should be viewed as rights whose violations "seriously diminish" the likely accuracy of a death verdict and "undermine the fundamental fairness that must underlie" such a verdict. *Teague*, 109 S. Ct. at 1077.

A final justification for including *Caldwell* in the category of decisions recognizing bedrock rights of fundamental fairness can be found in a central concept of pre-*Teague* retroactivity law that was carried forward in modified form by *Teague*. Prior

---

[14] There can be no doubt that the prosecutor's repeated admonitions that the jury was "merely" making a "recommendation" were erroneous descriptions of the jury's obligation to issue a binding death verdict. *See* La. Code Crim. P., Art. 905.8 (1976) and La. Supreme Court Rule 28, set forth in Appendix A.

to *Teague* an important consideration bearing on the retroactivity of any constitutional decision was the extent to which the decision established a "constitutional principle[] designed to enhance the accuracy of criminal trials." *Solem*, 465 U.S. at 643. *Teague* embodies this concern in its reformulation of Justice Harlan's second exception to non-retroactivity, focusing on whether the likelihood of accuracy is seriously diminished by the violation of a particular procedural right. *Id.* at 1077. *Caldwell's* crucial objective is to prevent the substantial risk that capital sentencing verdicts may inaccurately reflect the jury's actual determination of what punishment should be inflicted, when the jury has been given false and misleading information. *Cf.* Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151-152 (1970) (a case in which the "jury was subjected to improper influences by a court officer" exemplifies the violation of a right concerned with assuring accuracy).

The retroactive application of a constitutional rule of this sort does not subordinate any legitimate interest of the State to the Petitioner. Both the State and the Petitioner have an overriding interest in avoiding the risk of execution of a death sentence that the jury may not have intended to be carried out. As the Fifth Circuit dissenters observed:

> We cannot agree that a state's interest in the finality of judgment of death outweighs a defendant's right that a sentencing jury, accurately informed of its role and responsibility, determine his moral culpability. Society takes little delight in the grim, but sometimes necessary, execution of a criminal defendant; its investment is in the informed, deliberative process by which the state's taking of a life is made legitimate.

Sawyer, 881 F.2d at 1305 (King, J., dissenting). *Accord*, *Hopkinson* v. *Shillinger*, 888 F.2d 1286 (10th Cir. 1989) (en banc) (holding that *Caldwell* rights are bedrock rights under *Teague*).

2. The Fifth Circuit Majority Used Inapt Analysis To Determine *Caldwell's* Status Under The Second Exception To *Teague*.

The Fifth Circuit majority analyzed the applicability of *Teague's* "fundamental fairness" doctrine to *Caldwell* largely

by an exegesis of two cases that have nothing to do with the purposes of either. The first case is *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). As we have noted earlier in this brief, the Fifth Circuit misperceives *Donnelly* as the source of *Caldwell*, instead of recognizing that *Donnelly* and *Caldwell* are distinct doctrines based on distinctly different concerns. This misapprehension leads the Fifth Circuit majority to imagine that *Caldwell's* "no effect" ingredient was a "modification" of *Donnelly* and can be sliced off from the *Caldwell* doctrine for examination as the relevant "new rule" under *Teague*. *Sawyer*, 881 F.2d at 1292-1293. The awkwardness of such a formulation betrays the fallacy inherent in the majority's claim that *Caldwell* is rooted in *Donnelly*, for this "slice" fails to include all of *Caldwell's* distinctive ingredients, and thus scarcely represents that which distinguishes *Caldwell* from *Donnelly*. Even more awkwardly, the Fifth Circuit majority concludes that while the core rule represented by *Donnelly* may be fundamental under *Teague*, the increment of *Caldwell* over *Donnelly* is not. *Sawyer*, 881 F.2d at 1293.

This muddled claim is contradicted by the face of the *Caldwell* opinion.[15] This Court explicitly described *Caldwell* violations as acts that, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment." *Caldwell*, 472 U.S. at 340. Furthermore, the heightened scrutiny that *Caldwell* demands of certain kinds of prosecutorial arguments responds precisely to *Caldwell's* insight that this particular species of prosecutorial argument is peculiarly likely to jeopardize the fairness and accuracy of capital sentencing deliberations, not less likely to do so than other prosecutorial errors. This is true whether the demand for heightened scrutiny is incorrectly viewed as an increment over *Donnelly*, or correctly viewed as a separate

[15] It is also contradicted by *Darden*. The only defendants who can receive relief under *Caldwell* are those whose claims satisfy the exacting *Caldwell* criteria, most importantly the requirement that false or misleading information about the non-finality of a death verdict has been communicated to the sentencer. *Darden*, 477 U.S. at 183-184 n.15.

legal doctrine rooted in concerns unique to the Eighth Amendment.

Rights that are "bedrock elements" under *Teague* can be identified only through consideration of *Teague's* policies supporting retroactive application of such rights. The Fifth Circuit majority does not explain how its exclusion of *Caldwell* from the bedrock category serves such policies. Nor does the majority consider the ways in which *Caldwell* qualifies for retroactive application under *Teague's* implicit guidelines. As the majority's decision to so exclude *Caldwell* was not based on *Teague's* reasoning, it should not be adopted by this Court.

The Fifth Circuit majority's second inapposite analysis consists of reasoning by analogy from the procedural default holding in *Dugger* v. *Adams* to a definition of "fundamental fairness" for the purpose of identifying bedrock *Teague* rights. *See Dugger*, ___ U.S. ___, 109 S. Ct. 1211, 1217-1218 & n.6 (1989). *Dugger* held that *Caldwell* violations do not automatically satisfy the requirement of showing a "fundamental miscarriage of justice" as the basis for relief from the procedural default rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). *See Dugger*, 109 S. Ct. at 1217 n.6. Instead, such showings must be made on a case-by-case basis, in accordance with this Court's prior *Sykes* doctrine.

The Fifth Circuit majority asks "why a *Caldwell* violation" should be "fundamental" under *Teague* but not under *Dugger*. *Sawyer*, 881 F.2d at 1293-1294. The answer is quite apparent once one avoids the trap of assuming that similar words necessarily carry the same doctrinal baggage. *See* M. Hancock, *Fallacy of the Transplanted Category*, 37 Can. B. Rev. 535 (1959). The use of a "fundamental fairness" test to demark *Teague's* second exception, and the use of a roughly similar formula in connection with the "miscarriage of justice" exception to *Sykes*, serve entirely different purposes and policies.

In the *Sykes* context, the inquiry is whether the kind and degree of harm suffered as a result of a constitutional violation that a habeas petitioner might have averted by timely objection are so cogent that they should be recognized as excusing his failure to make that objection. In the *Teague* context, the very

different inquiry is whether the kind and degree of harm threatened by conducting trial proceedings in disregard of a constitutional norm that is subsequently recognized as governing such proceedings are so cogent that the norm should be applied retroactively to persons who would otherwise be denied its benefit solely because of fortuities of timing for which they are not accountable. *Caldwell* satisfies *Teague's* carefully considered guidelines for identifying such norms. It constitutionalizes a principle whose disregard undermines the integrity of the sentencing process that is necessary to assure the "fundamental fairness" of a death verdict and seriously diminishes the likelihood of obtaining verdicts which are accurate reflections of the jury's reasoned sentencing choice.

The Fifth Circuit dissenters were not trapped in the majority's mistake, as they recognized the need for *Teague's* exception to be defined according to the policies that inspired the exception, not *Teague's* non-retroactivity rule. With regard to Eighth Amendment sentencing phase rights, the dissenters aptly identified a state interest that complements and reinforces the *Teague* interests in retroactive application of bedrock elements in non-capital cases. They identified that interest as the dividend of public confidence that accrues to the states when bedrock rights are applied to the giving of life and death verdicts, in order to insure the reliability of death verdicts. *See Sawyer*, 881 F.2d at 1305 (King J., dissenting).

This Court should not follow the Fifth Circuit majority's approach to *Teague's* "fundamental fairness" exception, because that approach does not seek to give effect to *Teague's* policies or to follow *Teague's* implicit guidelines for the determination of bedrock rights. Instead, this Court should adopt the Fifth Circuit dissent's approach, and hold that the *Caldwell* rule belongs in *Teague's* small catalogue of rights that guarantee the "fundamental fairness" that must underlie a death verdict.

II. THE PROSECUTOR VIOLATED ROBERT SAWYER'S EIGHTH AMENDMENT RIGHTS UNDER *CALDWELL* V. *MISSISSIPPI* BY MAKING FALSE AND MISLEADING CLOSING ARGUMENTS WHICH SUGGESTED THAT THE JURY'S DEATH VERDICT WAS NOT FINAL. AS THESE ARGUMENTS WERE NEVER CORRECTED, A RESENTENCING HEARING MUST BE PROVIDED IN ORDER FOR A RELIABLE VERDICT TO BE OBTAINED.

A. The Prosecutor Violated Robert Sawyer's Eighth Amendment Rights Under *Caldwell* By Making False And Misleading Closing Arguments Which Suggested That The Jurors Were Not Making A Final Decision About The Death Penalty, And That An Erroneous Death Verdict Could Be Corrected By Reviewing Courts.

The Fifth Circuit dissenters found that the prosecutor's arguments in Robert Sawyer's case "fall squarely within *Caldwell's* prohibition of misleading and inaccurate arguments regarding appellate review that seek to diminish the jury's sense of its responsibility," thereby violating the Eighth Amendment. *Sawyer*, 881 F.2d at 1296 (King, J., dissenting). They also note that, "Had the majority decided Sawyer's case on the basis of the Supreme Court's decisions in existence when Sawyer's case was argued and submitted to this court, the majority would have granted him a new sentencing hearing." *Id.* at 1305. This conclusion reflects the judgment that Robert Sawyer's prosecutor violated *Caldwell* because he communicated false and misleading messages clearly to the jurors, and led them to believe "that the responsibility for determining the appropriateness of a death sentence" rested not with the jury but elsewhere. *Caldwell*, 472 U.S. at 323.

Like the prosecutor in *Caldwell*, Robert Sawyer's prosecutor first emphasized in a variety of ways that the jury's sentence was both non-final, and reviewable by appellate courts. Second, the prosecutor went beyond the argument of the *Caldwell* prosecutor and told the jurors explicitly that an erroneous death verdict could be corrected by others. Finally, the false and misleading messages conveyed by the prosecutor here were more numerous than in *Caldwell*, and even more

calculated to achieve the effect of making jurors believe their death verdict was non-final. Thus, there are ample reasons for concluding that the *Caldwell* violation here was "focused, unambiguous, and strong," so that a resentencing hearing is required. *Caldwell*, 472 U.S. at 340.

It is clear that the jury's death verdict is binding under Louisiana law, and that the Louisiana Supreme Court has only limited powers to review death verdicts for constitutional error. *See* La. Code Crim. P., Art. 905.8 (1976) ("The court shall sentence the defendant in accordance" with the jury's verdict); La. Code Crim. P., Art. 905.9 (1976) ("The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive" under procedures as are necessary to satisfy "constitutional criteria"); La. Supreme Court Rule 28 (at Appendix A). It is also clear that the verdict form and jury instructions used in Robert Sawyer's trial were somewhat misleading regarding the jury's final responsibility for death, because they tracked the statutory language that referred to the jury's verdict as a "recommendation." *See* La. Code Crim. P., Art. 905.6, 905.7, 905.8 (at Appendix A), *and* J.A. 13-16, 19.[16] The prosecutor decided to take advantage of the misleading statutory term for the jury's death verdict by telling the jurors repeatedly that they should accept the idea that their death verdict was, indeed, merely "a recommendation." J.A. 7, 13. In addition, the prosecutor used other similar language in four separate episodes of argument to emphasize the non-final nature of the jury's verdict.

In the first of four episodes focusing on non-finality, the prosecutor assured the jury twice that a death verdict would not be the same thing as a death sentence. First, he stated that "you yourself will not be sentencing Robert Sawyer to the electric chair," if you find the statutory factors for death, and then he said "what you are saying" by a death verdict is that you

[16] The verdict form and jury instructions were changed in 1988, to reflect the change in the statutory term for the jury's death verdict, which is now called a "determination" not a "recommendation." *See* La. Code Crim. P., Arts. 905.6, 905.7, 905.8 (1988) (at Appendix A).

"are of the opinion" that "this is the type of crime that deserves that penalty." "It is merely a recommendation." J.A. 7. In the second episode focusing on non-finality, the prosecutor characterized a death verdict as a step that "could" lead to "prosecution" to the "fullest extent of the law," but nothing more. He stated that "you are the people that are going to take the initial step and only the initial step." "All you are saying" is "that you the people" will not tolerate the commission of the crime without the "impact of the law of Louisiana." "All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less." J.A. 8-9.

In the third and fourth episodes of bad argument, the prosecutor continued to focus on the non-finality of the jury's death verdict. First, he emphatically told the jurors that they should not feel responsible for an execution: "Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so." J.A. 9. Then, in the last episode, during his second closing, the prosecutor returned to his opening assurance that the jury's verdict was merely a recommendation, and by using the word "recommendation" four times in a misleading summation of his request for a finding of death:

> Now is the time and I ask that you *recommend* because all you are doing is making a *recommendation*. I ask that you *recommend* to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you *recommend* the death penalty. (emphasis added)

J.A. 13.

Three of the prosecutor's four episodes of bad argument also included explicit references to reviewing courts, as he sought to impress the jurors with the idea that their non-final verdict would be presented to judges who would have the responsibility for making the final decision about death. In the first episode, the prosecutor told the jurors that they would be "saying" their "opinion" and "mere recommendation" of death "to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, [and] the Supreme

Court possibly of the United States." J.A. 7. In the second episode, the prosecutor told the jurors that they would be "saying" their death verdict, that Robert Sawyer "could be prosecuted," to "this court, to the people of this Parish, to this man, [and] to all the Judges that are going to review this case after this day." J.A. 8-9. In the last episode, the prosecutor reminded the jurors in closing that they would be making a mere recommendation to "this Court and to any other Court that reviews Robert Sawyer's case." J.A. 13.

Robert Sawyer's prosecutor committed a *Caldwell* violation that was more egregious than that of the *Caldwell* prosecutor, because he actually assured the jurors that their death verdict, if erroneous, would be corrected by others. In the third episode of argument, he said,

> [I]f you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong. . .

J.A. 9. Even the *Caldwell* dissent suggested that it would be unconstitutional to go beyond statements about non-finality and reviewability and actually tell the jurors that an erroneous death verdict could be corrected. *See Caldwell*, 472 U.S. at 348 (Rehnquist, J., dissenting) (if the prosecutor argues that "the appellate court would correct any 'mistake' the jury might make in choice of sentence" this probably would not comport with "some constitutional norm"). *Cf. id.* at 325-326 (where argument that the death verdict was "not the final decision" and "automatically reviewable" was sufficient to be held unconstitutional by the *Caldwell* majority).

Robert Sawyer's prosecutor's argument was worse than the argument in *Caldwell* because his prosecutor went beyond making statements about appellate review that were technically correct but misleading to lay jurors. Robert Sawyer's prosecutor repeatedly characterized the jury's death verdict in ways that were legally false, stating that it was only an opinion, an initial step, a determination of potential prosecution, and "merely" a recommendation. In *Caldwell*, by contrast, it was true that the jury's verdict was "automatically reviewable," but the prosecutor failed to explain that it was reviewable only for

legal errors, and was "not final" only because appeals concerning legal errors were likely to occur. Thus, the argument was false and misleading to lay jurors, who would readily assume that the prosecutor's argument implied that their death verdict could be reviewed for factual error by appellate courts. *See Caldwell*, 472 U.S. at 330-333 (emphasizing lay juror's likely understanding of misleading references to appellate review and non-finality of a jury's sentence); *id.* at 342-343 (O'Connor, J., concurring) (emphasizing same). Robert Sawyer's prosecutor's argument is even more unconstitutionally false and misleading than the *Caldwell* argument.

For this reason, Judge King found a *Caldwell* violation to exist in this case, as she stated:

> It is unnecessary to decide whether any one remark violated *Caldwell* for it is readily apparent that the prosecutor's repeated references to appellate review and the jury's limited role in the death sentence calculus surely did so. When viewed in their totality, the remarks appear "focused, unambiguous, and strong." [citing *Caldwell*] The prosecutor clearly sought to leave the jury with the notion that their recommendation of death would be merely "the initial step" and that the "others who will be behind them" would be there to correct any error in that determination. The message of non-finality is clear.

Sawyer, 848 F.2d at 605 (King, J., dissenting from the panel opinion).

Other courts have found *Caldwell* violations where arguments contained fewer false and misleading messages than the argument here. One state court reversed a death verdict where a prosecutor argued that the defendant would get "appeal after appeal after appeal," that the Supreme Court wouldn't "let anybody get executed until they're absolutely sure that that man has a fair trial," and that the switch wouldn't be "pulled in a matter of hours" because "[i]t goes on and on and on." *Commonwealth* v. *Baker*, 511 A.2d 777, 787 (Pa. 1986). The Louisiana Supreme Court reversed a death verdict where the prosecutor gave a lengthy description of the state supreme court's powers to review a death verdict under Louisiana Supreme Court Rule 28. *State* v. *Clark*, 492 So.2d 862, 871 (La. 1986). As the *Clark* Court concluded, no purpose is served by a

description of "various grounds for reversal on appeal, however infrequently invoked by this court, except to suggest that [the jury's verdict] can be disregarded for numerous reasons." *Id.*[17]

As the *Caldwell* violation in Robert Sawyer's case was communicated to the jury in clear terms, a resentencing hearing must be granted unless the violation was corrected in clear terms as well. As in *Caldwell*, there is nothing in the trial judge's instructions that would provide such correction, because the only references to jury responsibility are the boilerplate sorts of remarks that this Court held insufficient to correct the *Caldwell* violation in *Caldwell* itself.

B. The *Caldwell* Violations Committed By Robert Sawyer's Prosecutor Were Not Corrected Or Retracted At Trial, And Therefore A Resentencing Hearing Must Be Granted.

Like the *Caldwell* prosecutor, Robert Sawyer's prosecutor never retracted his false and misleading remarks about the non-finality of the jury's death verdict. Nor did the trial judge in this case either correct the remarks when they were made, or make any later reference in jury instructions to their false and misleading content. Therefore, this Court's standard for correction of a *Caldwell* violation has not been met. *See Caldwell*, 472 U.S. at 339-340, 340-341 n.7; *id.* at 343 (O'Connor, J., concurring).

The *Caldwell* opinion makes it clear that "correction" for a *Caldwell* error cannot be provided by statements about the jury's responsibility that do not retract or undermine the erroneous assertion that a death verdict "would be reviewed by

---

[17] Courts also have reversed death verdicts where a *Caldwell* violation in the prosecutor's closing argument was aggravated by misleading jury instructions and verdict forms that did not inform the jurors sufficiently of the finality of their death verdict. *See, e.g., People* v. *Drake*, 748 P.2d 1237, 1258-1259 (Colo. 1988); *People* v. *Milner*, 45 Cal. 3d 227, 252-255, 753 P.2d 669, 686-689, 246 Cal. Rptr. 713, 7300-733 (1988). The *Caldwell* violation in Robert Sawyer's case was likewise made more damaging because of the confusing use of the term "recommendation" in the verdict form and the instructions given to the jury.

the appellate court to determine its correctness." *Id.* at 340-341 n.7. Or, as Justice O'Connor put it, correcting statements must "correct the impression that the appellate Court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate." *Id.* at 343 (O'Connor, J., concurring). Thus, prosecutorial comments stating that it is solely the jury's "job" to "decide the facts," or that "you're in the Jury Box to determine the punishment," will not provide a correction of error. Neither will a judge's instruction that the jury "must now decide whether the Defendant will be sentenced to death or to life imprisonment." These particular boilerplate statements were made in *Caldwell*, and were found to provide no correction of the false and misleading arguments there. *See Caldwell*, 472 U.S. at 346, 344 (Rehnquist, J., dissenting); *id.* (noting that the jurors were told to apply "the rules of law charged by the judge" and that statements made by counsel were not evidence, which boilerplate remarks were also disregarded by the *Caldwell* majority).[18]

Therefore, in Robert Sawyer's case, no correction for the *Caldwell* violation can be provided by isolated remarks by the prosecutor such as, "The decision is in your hands," or "It's all your doing." J.A. 8, 9. Nor was correction supplied by the boilerplate instructions of the trial judge, who made general references to the jury's "responsibility" to choose between life and death, but never explained that the correctness of a choice of death was not reviewable by appellate courts.[19] Lower

---

[18] Thus the Fifth Circuit majority erred when it noted that a court may "mitigate[] the effect of [a *Caldwell* violation] by instructing the jury that the judge is the sole source of the law and that the lawyer's arguments are not evidence." *Sawyer*, 881 F.2d at 1287. According to *Caldwell*, these boilerplate remarks should not be taken into account in assessing the existence of a constitutional violation.

[19] After the closing arguments, the trial judge made three such comments, instructing the jurors that they "must now determine whether" Robert Sawyer "should be sentenced to death or to life imprisonment," that it was their duty to consider his character and the circumstances of the crime "to determine which sentence should be imposed," and finally, that it was their responsibility "in accor-

courts have required that, at a minimum, a trial judge should immediately intervene and instruct the jury to disregard a prosecutor's *Caldwell* violation after it occurs. *See, e.g. Jones* v. *Butler*, 864 F.2d 348, 360-361 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 2090 (1989); *Bell* v. *Lynaugh*, 828 F.2d 1085 (5th Cir.), *cert. denied*, 484 U.S. 933 (1987). As Judge King found,

> This is not a case where the trial court admonished the jury to disregard the prosecutor's comments. Nor is this a case where the trial court meticulously instructed the jury on the errors in the prosecutor's argument.

Sawyer, 848 F.2d at 605-606 (King, J., dissenting from the panel opinion). Thus, no correction under *Caldwell's* standards can be found in Robert Sawyer's case.

Robert Sawyer's sentencing jury was never disabused of the notion that final responsibility for a death verdict might lie elsewhere. Therefore, *Caldwell* requires that a resentencing hearing be granted, because this Court must conclude, in light of the serious nature of the violation, that the *Caldwell* taint had a damaging effect on the jury. Once it is plain that Robert

---

dance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment [sic]." J.A. 13-14, 14, 16. None of these statements "correct the impression that the appellate court would be free to reverse the death sentence" if it were erroneous. *Caldwell*, 472 U.S. at 343 (O'Connor, J., concurring). The jurors would not find it inconsistent to be told that they were supposed to make a choice between life and death, and that, as they were told earlier by the prosecutor, if they chose death that choice would be reviewable on appeal.

While it is true that the trial judge told the jurors, at the outset of the sentencing hearing, that they had the authority to make "a binding recommendation to the trial judge," this statement preceded the prosecutor's closing arguments where he repeatedly argued that their recommendation was non-final and would be reviewed for correctness by others. J.A. 5. This instruction could not supply a correction before the *Caldwell* violation occurred, and no express message contradicting the prosecutor's false and misleading characterization of the jurors' "recommendation" was provided by the judge following his argument.

Sawyer's prosecutor committed a *Caldwell* violation that was clear and unambiguous, and that the violation was not corrected according to *Caldwell's* standard, then a resentencing hearing is needed. The risk of prejudice and unreliability from his prosecutor's damaging argument is so great that it cannot be said that the argument here had "no effect" on the jury. *Caldwell*, 472 U.S. at 341. *Accord*, *Sawyer*, 891 F.2d at 1284-1285 (affirming the appropriateness of *Caldwell's* "no effect" test as an expression of the risk of prejudice that occurs in every case with *Caldwell* violations). *See also Campbell* v. *Kincheloe*, 829 F.2d 1453, 1460-1461 (9th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 380 (1988); *Mann* v. *Dugger*, 844 F.2d 1446, 1457-1458 (11th Cir. 1988) (*en banc*), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1353 (1989). *But see Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1293-1295 (10th Cir. 1989) (*en banc*) (erroneously rejecting the "no effect" formula and replacing it with a "substantial possibility" of prejudice formula).

Robert Sawyer's case deserves constitutional relief, and his case is a rare one, as can be seen from the small number of federal and state cases where resentencing hearings have been granted because of a *Caldwell* violation. Not many prosecutors are tempted deliberately to commit errors such as *Caldwell* violations. But occasionally prosecutors will commit reversible misconduct in closing arguments, even in cases they expect to win. *See* Jonakait, *The Ethical Prosecutor's Misconduct*, 23 Crim. L. Bull. 550 (1987). True *Caldwell* violations must be condemned when they occur, because they pose a unique threat to the reliability and legitimacy of death verdicts. The Fifth Circuit majority declined to grant Robert Sawyer a resentencing hearing, because it believed that *Caldwell* could not be applied retroactively to his case. In fact, *Caldwell* should be applied because it fits well within this Court's *Penry* and *Teague* definitions of old law, and within *Teague's* definition of a decision that vindicates rights of fundamental fairness.

The Fifth Circuit's decision should be reversed, and Robert Sawyer should be given a resentencing hearing, so that the decision whether he should die will be put to a jury that is not misled about its responsibilities.

CONCLUSION

Because the result reached by the Court of Appeals is in direct conflict with the applicable holdings of this Court regarding the retroactivity of constitutional decisions, and because the petitioner has a valid constitutional claim on the merits, the judgment below should be reversed and petitioner's case should be remanded with instructions to grant the writ of habeas corpus with regard to the provision of a resentencing hearing.

Respectfully submitted,

CATHERINE HANCOCK*
ELIZABETH W. COLE
7031 Freret Street
New Orleans, LA 70118
(504) 865-5949
Counsel for Petitioner

Counsel of Record

APPENDIX

APPENDIX A

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694 § 1.

Art. 905.7 Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

/s/ _____
Foreman"

Added by Acts 1976, No. 694, § 1.

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Added by Acts 1976, No. 694, § 1.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court

by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Added by Acts 1976, No. 694, § 1.

SUPREME COURT RULE 28

Rule 905.9.1 Capital sentence review (applicable to La. C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript. Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report: Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital

sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan 1978.

Art. 905.6 Jury; unanimous determination

A sentence of death shall be imposed only upon a unanimous determination of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall render a determination of a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

Art. 905.7. Form of determination

The form of jury determination shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury unanimously determines that the defendant should be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____
Foreman"

or

"The jury unanimously determines that the defendant should be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

/s/ _____
Foreman"

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the determination of the jury. If the jury is unable to unanimously agree on a determination, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Amended by Acts 1988, No. 779, § 1, eff. July 18, 1988.

APPENDIX B

Citations To *Donnelly* v. *DeChristoforo* By State Courts In The Pre-*Caldwell* Era

The state courts of twenty-seven states and the District of Columbia cited *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), in the period before this Court decided *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985). A citation to *Donnelly* appeared in seventy-six capital and non-capital cases, which are listed below. In none of these cases did the court reject a "*Caldwell*" claim in the pre-*Caldwell* era on the basis of *Donnelly*.

SURVEY OF STATE COURTS CITING *DONNELLY* CHRONOLOGICALLY ORDERED WITHIN EACH STATE.

Alabama

1. *Beecher* v. *State*, 294 Ala. 674, 681, 320 So.2d 727, 733 (1975).*
2. *Stokes* v. *State*, 462 So.2d 964, 968 (Ala. Crim. App. 1984).**

California

3. *People* v. *Duran*, 127 Cal. Rptr. 618, 627 n.15, 628, 545 P.2d 1322, 1331 n.15, 1332 (1976) (*en banc*).*

Colorado

4. *People* v. *Constant*, 645 P.2d 843, 847 (Colo.) (*en banc*), *cert. denied*, 459 U.S. 832 (1982).

Connecticut

5. *State* v. *Kinsey*, 173 Conn. 344, 348, 377 A.2d 1095, 1097-1098 (1977).

---

*For asterisk key *see* page 12a *infra*.

6. *State* v. *Daniels*, 180 Conn. 101, 111, 429 A.2d 813, 818-819 (1980).**
7. *State* v. *Glenn*, 194 Conn. 483, 495, 481 A.2d 741, 748 (1984).**

Delaware

8. *Hooks* v. *State*, 416 A.2d 189, 204 (Del. 1980).*,**
9. *Hughes* v. *State*, 437 A.2d 559, 568 (Del. 1981).*,**
10. *Bailey* v. *State*, 440 A.2d 997, 1003 (Del. 1982).*,**
11. *Burke* v. *State*, 484 A.2d 490, 498 (Del. 1984).

District of Columbia

12. *Villacres* v. *United States*, 357 A.2d 423, 428 n.6 (D.C. 1976).
13. *Williams* v. *United States*, 379 A.2d 698, 700 (D.C. 1977).
14. *Powell* v. *United States*, 458 A.2d 412, 413 (D.C. 1983).
15. *Fornah* v. *United States*, 460 A.2d 556, 559 (D.C. 1983).
16. *Jones* v. *United States*, 477 A.2d 231, 248 (D.C. 1984).
17. *Sherrod* v. *United States*, 478 A.2d 644, 657 (D.C. 1984).**
18. *Gates* v. *United States*, 481 A.2d 120, 127 (D.C. 1984), *cert. denied*, 470 U.S. 1058 (1985).**

Georgia

19. *Quaid* v. *State*, 132 Ga. App. 478, 483-484, 208 S.E.2d 336, 342 (1974).**
20. *Williams* v. *State*, 242 Ga. 757, 759, 251 S.E.2d 254, 256 (1978).*
21. *Finney* v. *State*, 253 Ga. 346, 348-349, 320 S.E.2d 147, 151 (1984), *cert. denied*, 470 U.S. 1088 (1985).*,**,***

Hawaii

22. *State* v. *Amorin*, 58 Haw. 623, 629, 574 P.2d 895. 899 (1978).**

Idaho

23. *Schwartzmiller* v. *Winters*, 99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978).

24. *State* v. *Hodges*, 105 Idaho 588, 595-596, 671 P.2d 1051, 1058-1059 (1983).**[1]

Illinois

25. *People* v. *Harrington*, 22 Ill. App. 3d 938, 948, 317 N.E.2d 161, 168 (1974).

Indiana

26. *Richard* v. *State*, 299 Ind. 607, 612, 382 N.E.2d 899, 903 (1978), *cert. denied*, 440 U.S. 965 (1979).

Iowa

27. *State* v. *Johnson*, 219 N.W.2d 690, 698 (Iowa 1974).

Kentucky

28. *Elswick* v. *Commonwealth*, 574 S.W.2d 916, 920 (Ky. Ct. App. 1978).**

29. *Redd* v. *Commonwealth*, 591 S.W.2d 704, 707 (Ky. Ct. App. 1979).**

30. *White* v. *Commonwealth*, 611 S.W.2d 529, 531 (Ky. Ct. App. 1980), *cert. denied*, 452 U.S. 966 (1981).

31. *Nugent* v. *Commonwealth*, 639 S.W.2d 761, 765 (Ky. 1982).*,**

Maine

32. *State* v. *Gordon*, 321 A.2d 352, 364 (Me. 1974).

---

[1] *Donnelly* cited in dissent.

33. *State* v. *Hinds*, 485 A.2d 231, 238 (Me. 1984).**

Maryland

34. *Wilhelm* v. *State*, 272 Md. 404, 425-427, 437, 326 A.2d 707, 721-722, 733 (1974).*

35. *Blackwell* v. *State*, 278 Md. 466, 482, 365 A.2d 545, 554 (1976), *cert. denied*, 431 U.S. 918 (1977).*[2]

36. *Stevenson* v. *State*, 299 Md. 297, 307, 473 A.2d 450, 455 (1984).*

Massachusetts

37. *Commonwealth* v. *Dunker*, 363 Mass. 792, 799, 298 N.E.2d 813, 818 (1973).**

38. *Commonwealth* v. *Stone*, 366 Mass. 508, 515, 320 N.E.2d 888, 894-895 (1974).*,**

39. *Commonwealth* v. *Coleman*, 366 Mass. 705, 714 n.1, 322 N.E.2d 407, 403 n.1 (1975).**

40. *Commonwealth* v. *Gilday*, 367 Mass 474, 497, 327 N.E.2d 851, 864-865 (1975).*,**

41. *Commonwealth* v. *MacDonald*, 368 Mass 395, 401, 333 N.E.2d 189, 193 (1975).*,*

42. *Commonwealth* v. *Killelea*, 370 Mass. 638, 648, 351 N.E.2d 509, 515 (1976).**

43. *Commonwealth* v. *King*, 4 Mass. App. 833, 351 N.E.2d 549, 551 (1976).**

44. *Commonwealth* v. *Gouveia*, 371 Mass. 566, 572, 358 N.E.2d 1001, 1005 (1976).**

45. *Commonwealth* v. *Shelley*, 371 Mass. 466, 471, 373 N.E.2d 951, 954 (1978).**

---

[2] *Donnelly* was cited as support for rejecting a claim of ordinary misconduct, and a "*Caldwell*" claim was separately rejected under a different analysis.

46. *Commonwealth* v. *Villalobos*, 7 Mass. App. 905, 388 N.E.2d 701, 703 (1979).**

47. *Commonwealth* v. *Hawley*, 380 Mass. 70, 89, N.E.2d 827, 839 (1980).**

48. *Commonwealth* v. *Hogan*, 428 N.E.2d 314, 318-319 (Mass. App. Ct. 1981), *cert. denied*, 440 N.E.2d 1173 (Mass. 1982).**

49. *Commonwealth* v. *Collins*, 386 Mass. 1, 14, 434 N.E.2d 964, 972 (1982).

50. *Commonwealth* v. *Francis*, 391 Mass. 369, 373, 461 N.E.2d 811, 814 (1984).**

Minnesota

51. *State* v. *Threinen*, 328 N.W.2d 154, 157 (Minn. 1983).**

Missouri

52. *State* v. *Connell*, 523 S.W.2d 132, 137-138 (Mo. Ct. App. 1975).**

53. *State* v. *Rutledge*, 524 S.W.2d 449, 458 (Mo. Ct. App. 1975).**

54. *State* v. *Bailey*, 526 S.W.2d 40, 42 (Mo. Ct. App. 1975).**

55. *State* v. *Neal*, 526 S.W.2d 898, 902-903 (Mo. Ct. App. 1975).**

56. *State* v. *Lacy*, 548 S.W.2d 251, 252-253 (Mo. Ct. App. 1977).**

57. *State* v. *Wright*, 558 S.W.2d 321, 323 (Mo. Ct. App. 1977).**

58. *State* v. *Hoskins*, 569 S.W.2d 235, 236 (Mo. Ct. App. 1978).**

Nevada

59. *Allen* v. *State*, 91 Nev. 78, 83, 530 P.2d 1195, 1198 (1975).

60. *State* v. *Hickman*, 204 N.J. Super. 409, 412-413, 499 A.2d 231, 233-234 (1975).**

New Mexico

61. *State* v. *White*, 101 N.M. 310, 681 P.2d 736, 740-741 (N.M. Ct. App. 1984), *cert. denied*, 101 N.M. 189, 679 P.2d 1287 (1984).**

62. *People* v. *Adams*, 107 App. Div. 2d 1040, 1041, 486 N.Y.S.2d 102, 103 (1985).**

Oklahoma

63. *McDonald* v. *State*, 553 P.2d 171, 176 (Okla. Crim. App. 1976).*

Pennsylvania

64. *Commonwealth* v. *Wiggins*, 231 Pa. Super 71, 74 n.2, 328 A.2d 520, 521 n.2 (1974).**

65. *Commonwealth* v. *Hamilton*, 460 Pa. 686, 698, 334 A.2d 588, 594 (1975).*,**

66. *Commonwealth* v. *Reynolds*, 254 Pa. Super. 454, 458 n.4, 386 A.2d 37, 39-40 n.4 (1978).

67. *Commonwealth* v. *Bullock*, 284 Pa. Super. 601, 610, 426 A.2d 657, 661 (1981).**

South Carolina

68. *Simmons* v. *State*, 264 S.C. 417, 437, 215 S.E.2d 883, 893 (1975).*,**[3]

Texas

69. *Johnson* v. *State*, 604 S.W.2d 128, 137 n.8 (Tex. Crim. App. 1980).*,**[4]

70. *Cannon* v. *State*, 668 S.W.2d 401, 407 n.6 (Tex. Crim. App. 1984) (*en banc*)**[5]

---

[3] Dissent citing *Donnelly* dissent.

[4] Dissent citing *Donnelly* in string cite for an irrelevant proposition.

[5] Dissent citing *Donnelly* in string cite for an irrelevant proposition.

Utah

71. *Walker* v. *State*, 624 P.2d 687, 690 n.5, 691 n.13 (Utah 1981).**

72. *State* v. *Rebideau*, 132 Vt. 445, 449, 321 A.2d 58, 61 (1974).

73. *State* v. *Kasper*, 137 Vt. 184, 209, 404 A.2d 85, 99 (1979).**

74. *State* v. *Savo*, 141 Vt. 203, 213, 446 A.2d 786, 792 (1982).**

75. *State* v. *Foy*, 144 Vt. 109, 116, 475 A.2d 219, 224 (1984).**

Wyoming

76. *State ex rel. Hopkinson* v. *Teton*, 696 P.2d 54, 68 (Wyo.) *cert. denied*, 474 U.S. 865 (1985).*,**

*capital offense charged
**alleged error in closing argument
***sentencing phase

STATES WHOSE STATE COURTS DID NOT CITE *DONNELLY* IN THE PRE-*CALDWELL* ERA

Alaska
Arizona
Arkansas
Florida
Kansas
Louisiana
Michigan
Mississippi
Montana
Nebraska
New Hampshire
North Carolina
North Dakota
Ohio
Oregon
Rhode Island
South Dakota
Tennessee
Virginia
Washington
West Virginia
Wisconsin

Counsel wish to acknowledge the assistance of Ken Levine and Aaron McGee of the Appellate Advocacy Clinic at Tulane Law School who helped to prepare this survey.